

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2021/HP/EP/0016

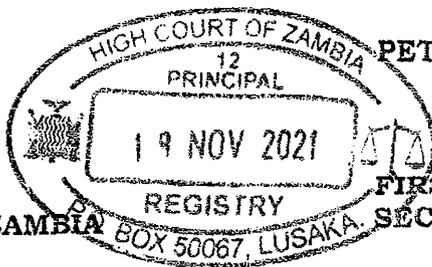
BETWEEN

CHARLES ABEL MULENGA

AND

JOSEPH MALANJI

ELECTORAL COMMISSION OF ZAMBIA



PETITIONER

FIRST RESPONDENT

SECOND RESPONDENT

Before the Honourable Mr Justice K. Chenda on 19th November 2021

For the Petitioner : Mr. Z. Sinkala of Muleza Mwimbu & Co. and Mr M. Kasaji of CL Mundia & Co.
For the First Respondent : Mr. L. Mumba of Ferd Jere & Co.
For the Second Respondent: Mr. A. Imonda of A. Imonda & Co.

JUDGMENT

The Grand Norm:

- (i) The Constitution, Chapter 1 of the Laws of Zambia in articles 52(4), 70(1) and (2), 73(1), 70(1) and 121;

Primary Legislation:

- (ii) The Electoral Process Act No. 35 of 2016 in sections 81, 82, 83, 84, 87, 89(1)(e), 96(1), 97, 98, 99, 100(3), 106(1) and 109;
- (iii) The Constituency Development Fund Act No. 11 of 2018 in section 15(3) and 21(1);

Subsidiary Legislation:

- (iv) The Electoral Process (General) Regulations S. I. No. 63 of 2016 in regulation 49 (2);

Case Law:

- (v) *Nkandu Luo & ECZ v Doreen Sefuke Mwamba & AG* - Selected Judgment No. 51 of 2018 at p. J50-51;

- (vi) *In Re Clare, Eastern Division Case* (1892) 4 O'M & H 162 at 164;
- (vii) *Morgan & Ors. v Simpson & Anr.* (1974) 3 All ER 722 at 731 from line h;
- (viii) *Sibongile Mwamba v Kelvin M. Sampa & Anr.* Vol 3 (2007) ZR 284 at 316 -317
- (ix) *Galaunia Farms Limited v National Milling Company Limited* (2004) ZR1 at pages 9-10;
- (x) *Mwalimu Simfukwe v Evaristo David Kasunga* - Appeal No. 50 of 2013;
- (xi) *Abiud Kawangu v Elijah Muchima* - Appeal No. 8 of 2017 (2016/CC/A039);
- (xii) *Richwell Siamunene v Sialuhalo Gift* Vol. 3 (2017) ZR 335 at 354;
- (xiii) *Match Corporation Limited v Development Bank of Zambia & Anr* (1999) ZR 18 at p.23 lines 23 to 30;
- (xiv) *Undi Phiri v BOZ* (2007) ZR 186 at 195;
- (xv) *Bizwayo Newton Nkunika v Lawrence Nyirenda & ECZ* - 2019/CCZ/005 at page J75-J76;
- (xvi) *Afrop Zambia Limited v Anthony Chate & Ors* - Appeal No. 160/2013 at p. J16; and

Authoritative Texts:

- (xvii) Halsbury's Laws of England 5th Edition (2013) Volume 38A (Elections and Referendums), Lexis Nexis: London at p. 176, footnote 4.

1. INTRODUCTION AND BACKGROUND

- 1.1 The governance system in Zambia is such that two out of the three primary organs derive their mandate directly from the citizenry through periodic elections.
- 1.2 The two said organs are: (i) the Executive for election of a Republican President as its head and also for election of local

government office bearers; and (ii) the Legislature for election of members of Parliament (“MP”).

- 1.3 The matter before Court relates to an election held on 12th August 2021 for legislative office whereby the Petitioner and First Respondent were among contestants for the seat of MP for Kwacha constituency in Kitwe district, Copperbelt province. The two were sponsored by the United Party for National Development (“UPND”) and the Patriotic Front party (“PF”), respectively.
- 1.4 The First Respondent emerged victorious in the election and aggrieved by that, the Petitioner escalated the contest to this third organ of the governance system seeking annulment of the election.
- 1.5 The Petitioner also sued the Second Respondent (“ECZ”) as the statutory body that conducted the election as mandated.
- 1.6 In his petition filed on 26th August 2021, the Petitioner alleged in the main that the election was tainted with violence, malpractices and procedural flaws. The Petitioner also challenged the qualifications of the First Respondent for the elective office.
- 1.7 In his answer filed on 13th September 2021, the First Respondent denied any wrongdoing and counter alleged that there was

adherence to the law governing both the elections and the preceding campaigns.

1.8 The Second Respondent did not file any pleading in reaction to the petition.

1.9 The pleadings were completed with the filing of a reply by the Petitioner on 18th September 2021 and amended by Order of this Court of even date. The final say of the Petitioner therein reiterated the grievances in the petition.

1.10 I heard the petition in Kitwe district from 16th September 2021 to 24th September 2021 and this is the reserved judgment, divided into 6 parts:

- (i) introduction and background (above);
- (ii) summary of the material facts;
- (iii) summary of the evidence;
- (iv) outline of the relevant law;
- (v) analysis and findings; and
- (vi) conclusion and orders.

2. SUMMARY OF MATERIAL FACTS PLEADED

2.1 The Petitioner has alleged that his quest for elective office was hindered by the First Respondent and his agents who included the Zambia Police.

- 2.2 The Petitioner has alleged that the said hindrances ranged from violent assaults inflicted on his supporters to removal of the Petitioner's campaign materials thereby reducing his visibility.
- 2.3 He has pleaded that he was also prevented by the Zambia Police from doing door to door campaigns.
- 2.4 It is pleaded by the Petitioner that the First Respondent by contrast was allowed to campaign freely.
- 2.5 The Petitioner has also alleged that the First Respondent employed a number of other malpractices during campaigns which included:
- i) undertaking three construction developmental projects in the Constituency; and
 - ii) distribution of money and mealie meal to the constituents.
- 2.6 The Petitioner complained that the said acts amounted to vote buying and inducement of the electorate.
- 2.7 The Petitioner has also alleged that after voting, the electoral process was mismanaged by the ECZ with various irregularities which included:
- i) discrepancies between votes recorded at the totalling centre and those declared /published in the Gen 20 forms; and

ii) some Gen 20 forms had key particulars missing such as presiding officer, polling station and constituency name such that they could not be said to be from polling stations in Kwacha Constituency.

2.8 The Petitioner has also alleged that the First Respondent was not qualified to be elected as he did not possess a Grade 12 certificate.

2.9 The Petitioner has concluded that the election of the First Respondent as MP was not free and fair. He has consequently prayed for it to be declared a nullity with costs.

2.10 The counter pleading by the First Respondent denies that there was any violence and vote buying tactics by the First Respondent or his agents and sponsoring party (PF) or removal of the Petitioner's campaign materials.

2.11 The First Respondent has denied that 2 of the 3 developmental projects were done by him. He has counter alleged that they were undertaken by the Constituency Development Committee, supervised by the Kitwe City Council and financed from the Constituency Development Fund("CDF"). The First Respondent has also alleged that the projects began before the campaign period.

2.12 The First Respondent has however admitted undertaking one of the projects complained of namely a bridge at Bulangililo Market. The First Respondent alleges that he constructed it from his personal resources before the campaign period and before dissolution of the National Assembly ahead of the elections.

2.13 The First Respondent denies that he was not qualified for election and counter alleges that the Second Respondent accepted his nomination as a candidate.

2.14 The First Respondent has pleaded that he had no control or authority over the work of the Second Respondent in managing the electoral process. He has also added that it was incumbent on the Petitioner to have polling agents who should have objected to any anomalies in the work of the Second Respondent.

2.15 As stated earlier, the Second Respondent did not file any pleading and opted instead to present evidence on the specific allegations levelled against it by the Petitioner.

3. SUMMARY OF EVIDENCE

3.1 **PW1 was the Petitioner who testified in chief** that he was a 56 year old resident of Riverside in Kitwe district. He contested in the

general elections as the candidate sponsored by UPND for the Kwacha constituency parliamentary seat.

- 3.2 Other contestants included the First Respondent under the ticket of the PF as his main competitor.
- 3.3 It was his testimony that he filed his nomination on 17th May 2021 and that the campaign period that followed lasted up to 11th August 2021 at 18:00 hours.
- 3.4 The Petitioner complained that his campaign was hindered from the very first day by the actions of the First Respondent up to the end of the campaign period.
- 3.5 He lamented about violence at the hands of the agents of the First Respondent and also threats; intimidation and mockery.
- 3.6 The Petitioner complained that he was not free to go out and campaign for fear of being attacked and maimed.
- 3.7 One of the incidents of violence in the campaign period was when he sent his agents Beatrice Bwalya, Joseph Mulenga and Mailesi to go and put-up posters along Jambo Drive in Riverside Kitwe. The 3 came to his home with physical injuries and narrated how they were attacked during execution of their assignment. The incident was reported to the Police in the area.

- 3.8 He also complained about an incident where he and a Grace Sampa Malunga who was the UPND Kitwe Mayoral candidate were doing door to door campaigns in Musonda Compound accompanied by his 3 bodyguards. One of his bodyguards Geoffrey received a telephone call tip off that the Police were on their way to arrest the Petitioner for no reason.
- 3.9 It was his testimony that him and his entourage sought refuge in a well wisher's house and heard a lot of footsteps, only leaving after 30 minutes when the footsteps stopped.
- 3.10 The Petitioner also complained that the Police would often call him to the Riverside station to answer to charges which he had no knowledge of.
- 3.11 It was the Petitioner's testimony that even his visibility as a candidate was hindered as whenever he would send agents to put up posters on the street poles and buildings, they would be removed the next day by agents of the First Respondent. Even a billboard of the UPND presidential candidate was removed in town centre.
- 3.12 He testified that by contrast the First Respondent was allowed to freely campaign with posters and materials all over Kwacha Constituency.

3.13 The First Respondent also had free access to all other campaign activities including roadshows and two rallies namely at Chanda na mine grounds and Chantete.

3.14 It was his testimony that the First Respondent also used CDF facilities to undertake development projects in the constituency after the dissolution of Parliament in May 2021.

3.15 The Petitioner confirmed that the First Respondent was behind the projects when he inquired from the Civic Centre.

3.16 The projects included:

- (i) construction of a maternity ward at IDECO clinic in Musonda Ward, evidenced by the pictures exhibited as "CAM5" in his affidavit in reply;
- (ii) construction of an ablution block at Kwacha East market in June 2021 as evidenced by "CAM6", first three pictures in his affidavit verifying facts of petition;
- (iii) construction of a market shelter and stalls as seen in the next four pictures in the same affidavit; and
- (iv) construction of a bridge as shown by the last three pictures in his same affidavit.

3.17 According to the Petitioner, the said activities affected the election results as a lot of people who saw the construction were swayed

not to vote for him but for the First Respondent who they thought would bring development.

3.18 The Petitioner also testified that the First Respondent engaged in vote buying by distribution of money in the constituency.

3.19 He personally perceived two incidents firstly at Musonda Market in Riverside where he saw people queueing up for the First Respondent, who he saw stretching out his hand at every market stall visited. The Petitioner was prevented from taking a picture by security personnel in the area.

3.20 The second incident he perceived was at Ipusukilo market where he noticed a multitude of people gathered around the First Respondent. Upon inquiry he was told the First Respondent was handing out money.

3.21 The Petitioner complained that the tactics of the First Respondent earned him the nickname "Bonanza" and that it was unfair as voters were induced through the bribes to vote for the First Respondent.

3.22 It was the Petitioner's conclusion that the campaign was for the said reasons not free and fair.

3.23 The Petitioner also faulted the electoral process after close of voting and testified that the first of the Gen 20a forms exhibited

as 'CAM1' in his affidavit verifying facts had a breakdown of votes which when added would give 303 not the total of 312 endorsed thereon.

3.24 He pointed out that his polling agents were not allowed into the polling stations to witness the counting and endorse the ECZ Gen 20 forms.

3.25 He referred the Court to the exhibits collectively produced as "CAM1" in the affidavit verifying facts, many of which he said did not have the signatures of his polling agents on account of them being kept out of polling stations.

3.26 He also complained that some of the Gen 20 forms did not have the name of the Constituency written, others did not have the name of the presiding officer while others had errors on the total votes recorded.

3.27 The Petitioner concluded his evidence in chief by stating that the high levels of violence and electoral malpractices complained of influenced the voting patterns. The intimidation that he suffered from the police prevented him from campaigning freely. He closed by stating that the election was not free and fair and he prayed for this court to declare the results a nullity.

3.28 **The Petitioner was cross examined** firstly by Mr. Mumba, Counsel for the First Respondent during which he testified:

- (i) the Second Respondent accepted his nomination as a candidate for Kwacha Constituency and so did they for three other candidates who included the First Respondent;
- (ii) if a candidate's nomination is accepted then it means they are qualified for election;
- (iii) 3 of his agents were beaten at VML and it affected the outcome of the election, however, results from the polling stations in the area namely CBU1,2 and 3 show that he (the Petitioner) emerged victorious there over the First Respondent;
- (iv) the said results appear in exhibit CAM2, page 4 of 5 in the affidavit verifying facts;
- (v) there was also violence against Pastor Kapijimpanga and Bertha who were beaten up in Riverside along Jambo Drive;
- (vi) the Petitioner knew that it was within his rights to report to ECZ about incidents of violence which hindered his

- campaign but he did not do so as he had no confidence in the ECZ doing something about it;
- (vii) he was not aware of campaigns being suspended in some parts of Zambia because of violence but could confirm that ECZ did not suspend campaigns in Kwacha Constituency.
 - (viii) he did not manage to campaign from first day of campaign period to the end but only halfway;
 - (ix) the total number of votes cast in the first Gen 20 form exhibited "CAM1" in his affidavit verifying facts is 303 instead of the 312 written on the form;
 - (x) the Gen 20 forms that say Valley View 1,2 and 3 were not signed by polling agents but the results in "CAM 2" were all in his favour as victorious at those polling stations and he did not know if the failure to sign affected the outcome of the election;
 - (xi) the electoral process is managed by the Second Respondent through its officers but he does not know if the acts complained of against Second Respondent were done with the knowledge, approval or consent of the First Respondent;

- (xii) he was prevented from campaigning in many ways which included the Police who were however not the campaign manager or agent of the First Respondent;
- (xiii) Zambia Police like the Second Respondent had the obligation to ensure that the electoral process was done in a free environment;
- (xiv) He had issues with both Zambia Police and the First Respondent;
- (xv) On 6th July 2021 he witnessed the First Respondent making gestures at each market stall at Ipusukilo of stretching out his hand. The Petitioner was in his car at an elevated position on a nearby bridge. He did not go to verify what it is that the First Respondent was giving as he feared for his safety due to the First Respondent's security personnel thus, he asked someone who was there to verify and they did that it was money being given;
- (xvi) the Petitioner stated that he believed the person because the person was physically there but he conceded that there is a possibility that what he was told was not correct;

- (xvii) he also conceded that buying and selling characterizes the trading at markets;
- (xviii) he did not know that the 3 development projects complained of were initiated by the Constituency Development Committee, supervised by Kitwe City Council;
- (xix) the information which he had was that the projects were done by the First Respondent and he got the information from the Town Clerk's office through someone who had been sent to do inquiries while he waited in the car on account of status;
- (xx) campaign period began soon after nominations on 17th May 2021;
- (xxi) despite seeing the document at p.1 of First Respondent's bundle titled "Tender for Construction of a Maternity Ward at Ipusukilo Clinic with effective date of 5th May 2021 and forecasted completion of 28th August 2021, the Petitioner still maintained that the project was initiated during campaign period;
- (xxii) he saw the last page of the same document which showed that the Kitwe Town Clerk signed on behalf of employer

and maintained that the Town Clerk did so as an agent of the First Respondent with the knowledge, consent and approval of the First Respondent as Member of Parliament who works with the Town Clerk over CDF;

(xxiii) he knows the EPA and Electoral Code of Conduct and also the process of initiating a project namely:

- a) sitting MP requisitions for a project;
- b) CDF committee meets;
- c) full Council sits to approve; and
- d) Ministry of Local Government and Housing approves too.

and that notwithstanding maintained that the Council was an agent of the First Respondent in the projects;

(xxiv) he knew that CDF sits with the Council account but denied that the Town Clerk was controlling authority;

(xxv) he read out the second contract in the First Respondent's bundle of documents which had a commencement date of 23rd April 2021 for an ablution block and shelter at Kwacha market with Council and a contract as parties but he still maintained that the works were done by the

First Respondent and that they were done partly in the campaign period;

(xxvi) Lubwa Ward is in Nkana East and there is a Police post called Esther Lungu but the Petitioner does not know whether it was built by First Respondent with his personal funds;

(xxvii) the Petitioner did however emerge victorious over First Respondent at Lubwa Ward as evidenced from the results exhibited in "CAM2" of the affidavit verifying facts under the entries for the following polling stations at p. 4 of 5 and 5 of 5;

a) Matete 1

c) Malaiti 1

b) Matete 2

d) Kabala 1

(xxviii) he has lived in Kwacha Constituency for a long time but was working out of town in 2019 so was not aware of a by-election there in that year;

(xxix) he was not aware that 5 members of the same family died in a car crash; and

(xxx) he referred to the First Respondent as "Bonanza" but did not know that the name came from the First Respondent's charitable works in the Lubwa ward.

3.29 **The Petitioner was also cross examined** by Mr. Imonda, Counsel for the Second Respondent and testified that:

- (i) he complained that a number of Gen 20 forms amongst the batch produced as "CAM 1" were not signed by UPND agents as they were chased;
- (ii) he would get comfort from a document that was signed by a UPND agent;
- (iii) the declaration of the results of the Poll produced by him as "CAM3" showed total votes for each candidate in the Kwacha Constituency election and it was signed by a UPND agent but not by PF, NDC and SP candidates;
- (iv) he does not know why the agents of the other parties did not sign "CAM 3";
- (v) the 5th Gen 20 form under exhibit "CAM 1" was only signed by UPND on the party side but the Petitioner does not know whether the others did not sign because they were chased;
- (vi) the 14th Gen 20 form under exhibit "CAM 1" for Valley View SEC-01 shows that no agent for any party signed but the Petitioner as UPND candidate still got the highest votes;
- (vii) in paragraph 7 a of his petition, he complained about 1183 votes not being recorded at the totaling centre;

- (viii) the normal sequence of events in an election is –
- a) registered voters vote;
 - b) counting is done after end of voting period;
 - c) the count takes place at each polling station;
 - d) the votes of each candidate are recorded in Gen 20a form;
 - e) the Gen 20 a form is taken to the totaling centre;
 - f) the votes from each polling station are recorded in a document called record of proceedings; and
 - g) there is then a declaration of the results of the poll.
- (ix) according to paragraph 3 of his petition, Kwacha Constituency has 91 polling stations and this tallies with the record of proceedings exhibited by the Petitioner as “CAM 2”;
- (x) he agreed that exhibit “CAM 2” shows that the votes from all 91 polling stations were recorded;
- (xi) the totals of 17,065 votes for him and 25, 979 votes for the First Respondent as shown on “CAM 2” at p. 5 of 5 tally with those on the declaration of results;
- (xii) even if the Court agreed with him that 1183 votes were not recorded in his favour and were to add them to his total he

still would not have emerged as candidate with the highest votes; and

(xiii) looking at the complaint in 7(c) of his petition, he would not know if having incomplete ECZ documents would affect all candidates not just him.

3.30 **The Petitioner was re-examined** by Mr. Kasaji and testified that if a candidate presents documents to the returning officer which are verified and in conformance with the requirements of the electoral process then the candidate is duly nominated to contest for election.

3.31 It was his testimony that his campaigns were made an impossibility because of the violence and intimidation from the Police and agents of the First Respondent. As a result, he could not campaign daily but only a few hours in a week.

3.32 He testified that the First Respondent at the time had influence over the Police and could command them to displace the Petitioner as they did when he attempted to campaign.

3.33 The violence at VML affected the election as when the two ladies and one gentleman were beaten, it sent shockwaves into his

campaign team and followers who abandoned their activities for fear of losing their lives.

3.34 He was left to plead with people throughout the constituency to be courageous enough to continue with campaigns.

3.35 He did not report the violence on Pastor Kapijimpanga to ECZ as he did not believe/or have confidence that any action would be taken as most of the institutions tasked with managing elections used to ignore or fail to act on complaints from opposition parties.

3.36 **The Petitioner testified in re-examination** that Kitwe City Council was the agent of the First Respondent over the projects complained of as the Member of Parliament initiates projects and makes recommendations to the Council which comes up with a tender process. The Council thereafter signs tender and procurement documents not the MP. The CDF is channeled through the Council but the Town Clerk is not the controlling officer but simply a managing agent of GRZ and the MP.

3.37 The second contract in the First Respondent's bundle was initiated partly during campaign period as it has a second date of 24th May 2021 on it which was after start of campaigns following the nomination of 17th May 2021.

3.38 **PW2 was Webster Chimfwembe, a 68 year old resident of Kwacha East in Kitwe. He testified in chief** that he personally saw the initiation of three development projects in Kwacha Constituency as follows-

- (i) painting and construction of trading stalls at Kwacha East Market (which he identified in the pictures exhibited as "CAM 5,6 and 7" in the Petitioner's affidavit in reply;
- (ii) construction of an ablution block at the same Kwacha East Market (which he identified in the pictures exhibited as "CAM 8,9 and 10" of the same affidavit;
- (iii) construction of a maternity wing at Ipusukilo Clinic; and
- (iv) construction of a bridge (which he identified in the pictures exhibited as "CAM 11 and 12" in the said affidavit).

3.39 PW2 also testified that in July 2021 the First Respondent came with a lot of cadres to officiate at the opening of the bridge which was located about 5 metres away from PW2's garden. It was his testimony that he heard the First Respondent remark at the sight of a poster of the Petitioner that the Petitioner was too small to contest with him as he was "Bonanza".

3.40 It was his testimony in chief that on 6th July 2021 at about 15 hours he saw a motorcade of 4 land cruisers branded with PF

signage arrive at Ipusukilo market at the chicken stalls which was near where he was buying talk time. He heard the women chicken vendors screaming that “Bonanza” had come. PW2 testified that he saw the First Respondent come out of one of the vehicles and began to hand out money to the vendors. One of the ladies eventually counted the money amounting to K15,000.

3.41 It was PW2’s further testimony that from there the First Respondent went to Kapoto Market where he also distributed money. It was also his testimony that he was a registered voter at Mutupwa polling station in Kwacha Constituency.

3.42 PW2 also testified in chief that in August 2021 he went to Kitwe City Council with the Petitioner who stayed in the car while he (PW2) went to the Town Clerk’s office where he inquired and was advised that the First Respondent was responsible for the developmental projects seen in Kwacha Constituency during campaigns.

3.43 **PW2 was cross examined** by Mr. Mumba, Counsel for the First Respondent and testified that-

- (i) he did not belong to any political party and just asked for a lift from the Petitioner when they went to the Council;

- (ii) he then changed his statement to that he did not ask for a lift but was just standing at the roadside when the Petitioner picked him to go to the Council;
- (iii) he does not know who constructed the bridge and only saw the First Respondent commissioning it;
- (iv) he was interested in verifying the projects because he lived in Kwacha Constituency;
- (v) the K15,000 given out at Ipusukilo Market was in K50 notes;
- (vi) the First Respondent was accompanied by a Mr. Kalonga who lends people money and it is he who was pointing out to the First Respondent who to give money when they moved to Kapotwe Market;
- (vii) he identified the picture of the maternity ward at Ipusukilo clinic but did not take the picture and did not know the date construction started;
- (viii) he also does not know the date when the construction at Kwacha East Market started or whether it started in 2021;
- (ix) he had lived in Kwacha Constituency for 30 years;

- (x) he did not know which was the nearest polling station to Kwacha East Market and did not know if the construction project there affected the results of the election;
- (xi) all the developmental projects spoken of were good for the residents;
- (xii) he agreed that even if there is an election Government does not stop working.

3.44 **PW2 was not cross examined by Counsel for the Second Respondent.**

3.45 **When re-examined**, PW2 clarified that the issue was the timing of the projects which came after dissolution of Parliament and start of campaign period instead of between 2016-2021.

3.46 **PW3 was Mailesi Chibwe, a 24 year old resident of Riverside, Kitwe. She testified in chief** that she was a student and a registered voter at Bumi Polling Station in Kwacha Constituency.

3.47 It was her testimony that on 31st May 2021 she went on an assignment by the Petitioner to put up UPND flags and campaign materials in Kwacha Constituency. She was for that

purpose part of and with a team of 7 people who included Prisca, Beatrice, Justin, Kelvin, Banda and Makaveli.

3.48 PW3 testified that they began in Musonda Compound and progressed to VML in Riverside, where they continued to put up UPND campaign materials. They then began to head towards CBU and then two Hummer vehicles appeared on the scene. The persons in the vehicles questioned PW3 and her team about why they were removing campaign materials for their Boss. The said persons began to throw bottles at PW3 and her team and hurle insults at them.

3.49 PW3 ran away but was captured by the persons near the mobile money booths in the area.

3.50 It was her testimony that whilst captive, she was beaten with a short baton and stones causing her to bleed. She was taken to a tree at VML, beaten and insulted by them. They also took her wig and phone and made to climb a tree.

3.51 It was her testimony that she saw one of her team members in the tree too and queried why they were campaigning for the Petitioner who has done nothing in the area unlike the First Respondent and President Lungu who had built the road that they were walking on.

- 3.52 It was her testimony that the attackers removed the campaign materials that PW3 and team had displayed and instructed PW3 and her team member to get down from the tree
- 3.53 The assailants ordered the duo to take off their UPND campaign t-shirts which they did, remaining in their bras.
- 3.54 PW3 and her team member were then made to wear PF t-shirts and ordered to vote for all PF candidates from Presidential level down to Councilor and threatened that if they did not do so they would die.
- 3.55 It was PW3's testimony that the assailants ordered the two of them to tell their parents to do the same.
- 3.56 The assailants also threatened that if they found her campaigning again, she would die.
- 3.57 It was her testimony that the assailants also threatened to kill anyone who would record the incident.
- 3.58 PW3 testified that after the incident she sought medical attention at Kitwe Central Hospital for the injuries and that the medical report appears as "CAM 15" in the Petitioner's affidavit in reply. She still has a scar on the head and hearing problem in the right ear as a result of the incident.

3.59 She also said there was a video circulating on Facebook of the Hummers giving chase and of her being beaten and taken by two of the attackers. She identified the video as exhibit "CAM 13" in the affidavit in reply.

3.60 PW3 testified that after the incident she stopped moving around to campaign due to the threats and that she also voted for the PF candidates on election day as she was scared.

3.61 **When cross examined** by Mr. Mumba, Counsel for the First Respondent, PW3 testified that -

- i) she was attacked at VML in Riverside;
- ii) she did not know the owners of the Hummer vehicles;
- iii) the attackers were PF cadres according to her because they said they had been sent by their Boss;
- iv) she gleaned from the petition that there were 4 parliamentary candidates in the area but denied that the attackers could have come from anyone of the 4;
- v) the nearest polling station from where the incident happened was at CBU;
- vi) she read out exhibit "CAM 2" at p. 4 of 5 in the affidavit verifying facts which showed the following votes:

a) CBU1: Petitioner has 376 while the First Respondent had 215;

b) CBU2: Petitioner had 410 while the First Respondent had 180; and

c) CBU 3: Petitioner had 382 while the First Respondent had 201;

vii) despite seeing the said results she was not sure who had won at CBU polling station.

3.62 **PW3 was not cross examined by the Second Respondent's Counsel**

3.63 **When re-examined** by Mr. Kasaji, she testified that the persons who attacked her and the team were wearing PF regalia.

3.64 **PW4 was Beatrice Bwale**, a 25 year old resident of Riverside, Kitwe. It was **her testimony in chief** that she was a registered voter at Bumi Polling Station in Kwacha constituency and was part of the team with PW3 assigned to put up UPND campaign materials on 31st May 2021.

3.65 Her testimony echoed that of PW3 adding that when questioned why they were removing PF posters one of PW3 and

- PW4's drivers informed the attackers that they were not removing them but only putting up UPND campaign materials.
- 3.66 PW4 also added that she knew that the attackers were PF cadres because they wore PF t-shirts and referred to the First Respondent by name as their boss. She also added that the cadres were about 30 in number.
- 3.67 It was her evidence in chief that just like PW3 she was beaten, made to remove her UPND t-shirt and made to wear a PF t-shirt. PW4 added that the attackers made her remove the UPND campaign materials which she had stuck up.
- 3.68 PW4 testified that because of the death threats that she received from the attackers, she stopped going around to campaign out of fear and that on election day she voted for all the PF candidates at the 3 levels as ordered by her attackers who threatened to kill her if she did not do so.
- 3.69 PW4 said she received medical treatment for her injuries and recognized her medical report as "CAM 16" in the Petitioner's affidavit in reply.
- 3.70 She also recognized herself in the video exhibited as "CAM 13" in the affidavit in reply as the first woman captured and that the second woman captured is PW3.

3.71 **When cross examined by Mr. Mumba** Counsel for the First Respondent, PW4 testified that –

- (i) she did not know the owners of the Hummer vehicles which were 3 in number;
- (ii) she also did not know the persons who came out of the Hummers but knew that they were PF cadres as they wore PF t-shirts and used the First Respondent's name as their boss and he is part of PF;
- (iii) she nervously restated that the cadres were about 30 and looked away from Court with unconvincing demeanour;
- (iv) she watched the video of the incident and it showed that only two people captured her and another two captured PW3;
- (v) she was an election agent for the Petitioner;
- (vi) she did not know whether the attackers were registered agents for the First Respondent;
- (vii) she confirmed that she was threatened that if she did not vote for the candidates as ordered by the attackers, something bad would happen to her;
- (viii) she did not make the decision to vote by herself;

- (ix) she voted at Bumi Polling Station on 12th August 2021 and was not accompanied by anyone in the voting booth;
- (x) she knows about valley view in Riverside; and
- (xi) exhibit "CAM 2" at p.4 of 5 in the Petitioner's affidavit verifying facts shows that the Petitioner scored higher than anyone else including the First Respondent at Valley View 1,2 and 3 polling stations.

3.72 **PW4 was not cross examined** by Counsel for the Second Respondent.

3.73 **When re-examined** by Mr. Kasaji PW4 testified that she stated that she did not make the decision to vote herself because she got confused during cross examination.

3.74 **PW 5 was Sandra Moonga** a 40 year old resident of Kwacha Constituency in Kitwe.

3.75 **She testified in chief** that she was a duly registered voter at Kwacha School Polling Station.

3.76 It was her testimony that on 11th August 2021 she went to Kwacha Market to collect money from a debtor. She was about to leave the debtor's shop when the debtor queried why she was leaving when Mr. Bonanza was visiting the Market and would be at her shop soon.

- 3.77 PW5 testified that upon her inquiry the debtor told her that Bonanza was the First Respondent and shortly after, the First Respondent entered the debtor's shop and found the two of them and two others.
- 3.78 PW5 testified that the First Respondent greeted her and then removed his hand from his pocket but kept the fist closed.
- 3.79 He put his hand in her right hand and said that the same way he has shown his closed fist is the same way that she should vote. She checked what he had put in her palm and discovered a K100 note.
- 3.80 PW5 testified that the First Respondent did the same with the other 3 people in the shop and then left.
- 3.81 It was her testimony that on election day she voted for PF since she had been given money.
- 3.82 **When cross examined** by Mr. Mumba, Counsel for First Respondent, PW5 testified that –
- (i) she had gone to collect K50 from the debtor whose name she did not know and whose shop did not have a name;
 - (ii) she denied that she was making up a story as she knew the debtor;

- (iii) even the First Respondent would not know the names of the shops and persons who he gave money;
- (iv) she used to see the First Respondent on television but met him on 11th August 2021 for the First time in person and despite him wearing a mask, she knew it was him because he introduced himself by name;
- (v) the First Respondent was dressed in a black hat and green hood and stayed in the shop for about 7 minutes while some people remained outside;
- (vi) she voted at Kwacha School on 12th August 2021 where there were 3 polling stations; and
- (vii) she was not accompanied by the First Respondent nor monitored by him in the booth and the choice on who to vote for was hers and not the First Respondent's.

3.83 **PW5 was not cross examined** by the Second Respondent.

3.84 **When re-examined**, PW5 testified that the First Respondent was giving money for people to vote for him and was not asking for their names or names of their shops.

3.85 She clarified that it was the same in her business whereby if a person wants money and they have been repaying well she would not interrogate their name, shop and address.

- 3.86 **PW6 was Margret Mofya**, a 28 year old resident of Chipata Compound in Kwacha Constituency, Kitwe.
- 3.87 **She testified in chief** that she was a voter registered at Musonda Ward at the Catholic place. She stated that on 21st July 2021 at 12:30 hours, Mr. Katai who was the Musonda Ward Councilor under PF came to her home and gave her and another a total of K30, broken down as K10 and K20 notes.
- 3.88 According to PW6, Mr. Katai had also asked about their voters' cards and NRCs and urged them to vote for PF.
- 3.89 PW6 testified that on 11th August 2021 there was a meeting at Zambia compound which she attended as part of groups of many people lining up. It was attended by the First Respondent and they were given K100 each and told to vote for PF on 12th August 2021.
- 3.90 She closed off her testimony in chief by saying that on 12th August 2021 she voted for the First Respondent and President Lungu.
- 3.91 **When cross examined by Mr. Mumba Counsel for the First Respondent**, PW6 testified that-
- (i) she was a resident of Chipata compound under Musonda Ward;

- (ii) according to her, Mr. Katai was representing himself when he came to her home;
- (iii) as for the incident of 11th August 2021 where she was given K100, the people were put in 8 groups of 24 people each;
- (iv) it took place at Zambia compound at about 16:30 hours;
- (v) it was not a meeting for everyone but just for PF cadres;
- (vi) even though she did not belong to any political party she was at the meeting deemed to be a PF cadre; and
- (vii) she did not know the duty of a cadre to their party nor the duty of a candidate to their cadres.

3.92 **PW6 was not cross examined** by the Second Respondent.

3.93 **When re-examined**, PW6 stated that Mr. Katai told her that he was a Councilor.

3.94 **PW7 was Mary Luwenda** a 21 year old resident of Musonda compound, Riverside Kitwe.

3.95 She testified in chief that on 20th May 2021, Mr. Katai, a ward councilor for PF came to see her and her younger sister Racheal Sakachima. He got details of their voters' cards and NRCs and gave them K30.

3.96 PW7 testified that on 11th August 2021 the First Respondent came to Zambia compound and was giving out money out of which she received K100.

3.97 It was her testimony that she joined the moving crowd which had a lot of people including PF cadres and that on the way the First Respondent was giving out money.

3.98 She testified that the crowd moved on up to Kwacha after which she left for home.

3.99 It was her testimony that she voted for the First Respondent on 12th August 2021 because he gave her money and emphasized that she should not forget to vote for him.

3.100 **When cross examined** by Mr. Mumba for the First Respondent, PW7 had a very unimpressive demeanor and could not face the court when answering.

3.101 She nonetheless testified that-

(i) Mr. Katai came to her place and found her with her sister and said that when giving them money Mr. Katai said that they should vote for the First Respondent and should not forget him;

(ii) she then said that Mr. Katai said that they should vote for the First Respondent then she changed her testimony

to that Mr. Katai said that they should vote for him and the First Respondent;

(iii) she testified that the money that Mr. Katai gave was from the First Respondent as she (PW7) was there when the money was being released, she then changed her statement saying that she did not see the First Respondent giving money to Mr. Katai;

(iv) she then testified that Mr. Katai came to her home on 20th July 2021 which is different from 20th May 2021 stated in her evidence in chief;

(v) when questioned further about whether it was 20th May 2021 or 20th July 2021 PW7 testified that it was the 20th day of a month that she had forgotten;

(vi) she also stated that he came at 15 hours;

(vii) as for the incident of 11th August 2021, she stated that the crowd started off from Zambia compound at about 15 hours and arrived at Kwacha compound between 16-17 hours;

(viii) she had received money at Zambia compound and she had received money at Kwacha compound too;

- (ix) she agreed that she was with the First Respondent throughout campaigning for him with his foot soldiers but denied that he was supposed to help them move from one point to the other;
- (x) she joined the crowd because of the money;
- (xi) on 12th August 2021 she was not accompanied by the First Respondent to vote, he was not there in the booth and he did not monitor her choice of who to vote for;
- (xii) PW7 then testified in one breath that the First Respondent did not make the voting choices for her but when questioned further as to who was in the booth, she stated that it was the First Respondent; and
- (xiii) She knew that Mr. Katai visited her home as an agent of the First Respondent with the First Respondent's consent and approval but admitted that she did not witness the First Respondent instructing Mr. Katai to visit her home and solicit for her vote.

3.102 **PW7 was not cross examined** by the Second Respondent's Counsel.

- 3.103 **When re-examined**, PW7 clarified that she had asked Mr. Katai who sent him to her home and he stated that it was the First Respondent.
- 3.104 **PW8 was Brenda Chandwa**, a 32 year old resident of Kwacha, Kitwe.
- 3.105 **It was her testimony in Chief** that on 11th August 2021 at about 15 hours she was on her way to Kwacha Market and saw a crowd of people who informed her on inquiry that Mr. Bonanza, the First Respondent was around.
- 3.106 She testified that she drew closer to the crowd and the First Respondent grabbed her hand and gave her K100 urging her not to forget who to vote for. She took the money and bought relish before returning home.
- 3.107 It was her testimony that on 12th August 2021 she cast her vote at Mtantwa Polling Station and in favour of the First Respondent because he gave her money and because of hunger.
- 3.108 **When cross examined** by Mr. Mumba, Counsel for the First Respondent, PW8 testified that –
- (i) on 12th August 2021 she voted at Mtantwa School, unaccompanied by anyone in the booth; and

(ii) she was given ballot papers for election of President, MP, Mayor and Councilor and there was no one who chose for her instead she exercised her freedom.

- 3.109 **PW8 was not cross examined** by the Second Respondent's Counsel
- 3.110 **When re-examined** PW8 testified that she voted for the First respondent because he gave her money, which was on her mind as she was voting.
- 3.111 **PW9 was Prosper Mutula**, a 57 year old resident of Ipusukilo, Kitwe.
- 3.112 **It was his evidence in Chief** that on 12th August 2021, he was an election monitor on duty at Mukuba Polling Station under the Zambia Education, Electoral Governance Initiative (ZEEGI).
- 3.113 It was his testimony that in the morning of the said day he saw people wearing PF regalia setting up a cooking camp complete with food and alcohol. The persons were more than 30 in number and were telling people to vote for PF and thereafter visit the camp for food.
- 3.114 PW9 also testified that he heard that voters were also being given money ranging from K50 to K 20.

3.115 It was his evidence that the camp was about 90 metres away from the polling station and that it was from morning up to 18 hours on 12th August 2021.

3.116 **When cross examined** by Mr. Mumba, Counsel for the First Respondent PW9 testified that –

(i) on 12th August 2021 he was a monitor under ZEEGI and that he monitored outside the polling station;

(ii) he agreed that as a monitor he had an obligation over the conduct of the election and to the presiding officer of the station;

(iii) he agreed that it was his duty to report to the presiding officer about the cooking camp set up by a political party but did not know whether he also had to inform the district electoral officer; and

(iv) he did not inform the district electoral officer about it.

3.117 **PW9 was not cross examined** by the Second Respondent's Counsel.

3.118 **PW9 was not re-examined** by the Petitioner's Counsel.

3.119 **PW10 was Abineza Kaluba Chella**, a 50 year old resident of Ipusukilo in Kwacha constituency, Kitwe.

- 3.120 **It was his testimony in chief** that he was previously the Ipusukilo ward chairman under PF but after his suspension, defected to UPND on 21st July 2021 accompanied by 300 other defectors, welcomed at the UPND secretariat.
- 3.121 **It was his testimony** that he began campaigning for UPND on 25th July 2021 and that on 26th July 2021 three PF officials came to his home to hurl verbal abuse that he had stolen from PF and moved to UPND. The 3 were Alex Chembo, the Constituency Chairman, Alice the Women's secretary and Beatrice Kanshamba.
- 3.122 He testified that the insults continued on 27th July 2021 but fortified by a security team created by the First Respondent clad in overalls, hats and boots.
- 3.123 According to PW10 even the Police appeared looking for him but did not find him.
- 3.124 At night the security team returned to his home and broke doors and windows. PW10's wife is the one who saw them as by that time PW10 and his two sons aged 17 and 21 years had gone into hiding.
- 3.125 It was his evidence that the First Respondent had promised a ransom of a house for anyone who would find PW10. For that

reason, PW10 did not even vote despite phone calls from the Petitioner for him to return and campaign.

3.126 It was his testimony that a lot of people wanted to follow him to defect to UPND but they remained without guidance after he went into hiding and that they did not vote.

3.127 PW10 testified that he only returned from hiding on 17th August 2021.

3.128 **When cross examined** by Mr. Mumba Counsel for the First Respondent PW10 testified that –

- (i) he was a UPND supporter would have been happy if the Petitioner had won the election;
- (ii) he could not confirm that he defected to UPND because of his suspension;
- (iii) the Police were looking for him as if he had stolen but he had not;
- (iv) he and his sons who were with him in hiding did not vote and he believed that his 300 supporters did not vote too as they had no one to lead them;
- (v) he did not know that voting is done alone without being accompanied; and

(vi) he was not at home the night of the attack but his wife and children were and they woke up and saw it when it happened at about 01:00 hours.

3.129 **PW10 was not cross examined** by the Second Respondent's Counsel.

3.130 **When re-examined** PW10 testified that when the Police went to his home, he was not there but he saw them and they were a lot. He got scared to return home and decided to go into hiding.

3.131 **PW11 was Joseph Lubilo**, a 34 year old resident of Musonda compound in Kitwe.

3.132 **It was his evidence in chief** that he worked as a monitor at Bumi Polling Station on election day 12th August 2021 under assignment from the Community Project and Human Development from 06:00 hours.

3.133 He testified that Mr. Katai, a known Councilor candidate for PF appeared at the Polling Station and his presence was queried by PW11.

3.134 It was his evidence that Mr. Katai made a telephone call from his mobile saying "Bwana Joe send me some people to deal with a situation". Eventually a brownish gold Landcruiser

appeared which was well known as belonging to the First Respondent with people who drive it as being usually found with him.

3.135 It was PW11's testimony that the persons who emerged from the vehicle looked agitated, pushed him around, insulted and whisked him away from the polling station.

3.136 He testified that they told him that they were there because of a call from Mr. Katai. PW11 stated that after a struggle he escaped from them and ran into a compound for refuge.

3.137 It was PW11's testimony that whilst there a person advised him to leave the scene as the vehicle was still nearby and Mr. Katai had sent people to injure him.

3.138 According to PW11 he heeded the advice and fled the scene, between 10:00 hours and 11:00 hours.

3.139 **PW11 was cross examined** by Mr. Mumba Counsel for the First Respondent and testified that-

(i) he was a monitor and was required to be neutral and impartial;

(ii) he was monitoring the inside of Bumi Polling Station but had leeway to monitor outside too;

- (iii) he was registered with the Second Respondent as a monitor and was told about the electoral code of conduct and requirement for agents;
- (iv) Mr. Katai and the First Respondent were different persons and to his knowledge Mr. Katai was not the agent of the First Respondent for the election;
- (v) The motor vehicle that he described belonged to the First Respondent though he did not know its registration number nor verify its ownership at RTSA; and
- (vi) Bumi Polling Station is in Musonda ward and the incident that he testified about is the one pleaded in paragraph 7(m) of the Petition.

3.140 **PW11 was not cross examined** by Counsel for the Second Respondent.

3.141 **When re-examined**, PW11 testified that he maintained that the vehicle belonged to the First Respondent as it was known as such and he could even point it out if he saw it.

3.142 **PW 12 was Geoffrey Chishala**, a 28 year old resident of Bulangililo, Kitwe.

- 3.143 **It was his testimony in chief** that from May 2021 to August 2021 he worked for UPND as part of the security detail and body guard for the Petitioner.
- 3.144 He testified that on 27th July 2021 he was part of the Petitioner's team on a door to door campaign in Ipusukilo ward together with Grace Malunga Sampa (Mayoral candidate) and Innocent Munjilo (Councilor candidate). Also present was Boyd Banda who was PW12's co-bodyguard for the Petitioner.
- 3.145 It was his testimony that Boyd Banda eventually left to seek medical attention and that at about 10 hours, PW12 received a strange call that they should abandon the campaign there as someone had called the First Respondent saying that UPND were having a rally so more than 300 police officers were headed their way.
- 3.146 It was PW12's testimony that he did not act on the tip off and then received a call from Boyd Banda telling him the same thing but he did not believe it and did not inform the Petitioner.
- 3.147 PW12 testified that instead he went to the roadside to check and saw a number of vehicles driving including one for Mr. Kangombe which had his portrait in the front as a PF candidate and a coffee vehicle in which PW 12 saw the First Respondent.

3.148 PW12 said he also saw a lot of Police officers and he informed the Petitioner and the delegation.

3.149 It was his testimony that they began to ran from one yard to the next and the Mayoral candidate removed her UPND regalia as they were being identified and tracked by it.

3.150 They sought refuge in a house about 30-40 minutes then PW12 called Boyd Banda who organized a different vchicle from the one earlier used and that is how they fled the scene.

3.151 PW12 closed his evidence in chief by stating that from that day they abandoned the door to door campaigns for fear of the Petitioner getting captured.

3.152 **When cross examined** by Mr. Mumba Counsel for the First Respondent PW12 testified that-

- (i) on 27th July 2021 he was on a campaign trail at Ipusukilo ward with fellow UPND supporters;
- (ii) when he got the phone call, he inquired about who the caller was and she told him that it doesn't matter;
- (iii) he identified Mr. Kangombe's vehicle but did not know whether he was an agent or campaign manager for the First Respondent;

- (iv) the Police officers were in Police vehicles and PW12 did not talk to them nor did they talk to him;
- (v) he did not know whether the Police who came on 27th July 2021 worked for the First Respondent or GRZ;
- (vi) at present the Police work for GRZ not the First Respondent;
- (vii) the First Respondent did not go to the hospital for his injury;
- and
- (viii) he (PW12) would be happy if the Petitioner had won the election.

3.153 **PW12 was not cross examined by Counsel for the Second Respondent.**

3.154 **When re-examined PW12 testified that during the election the Police were not doing their job but working under the First Respondent.**

3.155 **PW13 was Boyd Banda a 31 year old resident of Chipata compound, Kitwe.**

3.156 **It was his testimony in chief that on 27th July 2021 he, PW12, Grace Sampa Malunga and Innocent Munjile met the Petitioner at his home and then set off for door to door campaigns in Ipusukilo ward from about 10 hours.**

- 3.157 It was his testimony that he eventually developed a headache and left the group for a nearby clinic.
- 3.158 PW13 testified that whilst enroute he got a strange call advising him to leave Ipusukilo ward immediately. He then saw a group of Police and hid from them.
- 3.159 It was PW13's testimony that he called the strange number to inquire and was advised to hide the Petitioner, Mayor and Councilor candidates as someone had called the First Respondent saying that UPND were having a rally.
- 3.160 PW13 testified that he thereafter tried to call the Petitioner and also PW12 but they did not pick. He only got through to Norman, one of their other colleagues who he advised to move the candidates to safety until he got there.
- 3.161 It was his testimony that when he reached Ipusukilo Police Station, he saw a convoy of police vehicles and ran away from them after which they gave chase but failed to catch him.
- 3.162 PW13 testified that he eventually got through to PW12 over the telephone and also spoke to Norman again.
- 3.163 He closed his evidence in chief saying he organized a vehicle from the Petitioner's residence which vehicle was used to pick the Petitioner and the Mayoral candidate and take them home.

3.164 **When cross examined** by Mr. Mumba for the First Respondent, PW13 testified that –

(i) on 27th July 2021 he went to Ipusukilo as a UPND supporter to ask for votes and would have been very happy if all the UPND candidates had won;

(ii) since they lost, he was disappointed but he would not do anything to get the elections nullified as he was just a witness to testify about what happened; and

(iii) he confirmed that he ran away from the Police without communicating with them and believed that they were there for the UPND team because they (Police) gave chase.

3.165 **PW13 was not cross examined by the Second Respondent Counsel.**

3.166 **When re-examined** PW 13 testified that he left for the clinic midstream the door to door campaigns after which he got a call that someone had called the First Respondent that UPND had a rally in the area, which is why the police came.

3.167 **PW14 was Alice Bwalya Mulenga**, a 47 year old resident of Chipata compound.

- 3.168 **It was her testimony in chief** that on 4th August 2021 she went to Chikwepe market at Chipata Compound to collect her child's uniform from a tailor and found people making noise.
- 3.169 She testified that it was pointed out to her that the person she saw with the crowd was the First Respondent.
- 3.170 It was her testimony that the First Respondent eventually came over and asked her about the uniform then he told her that the same way she had done so, she should vote for him. He then reached into his pocket and gave her K100 in two K50 notes.
- 3.171 PW14 closed her testimony in chief saying that she voted in Kwacha ward at Country Side School Polling Station in favour of the First Respondent and his presidential candidate since she was given money.
- 3.172 **When cross examined** by Mr. Mumba for the First Respondent, PW14 testified that-
- (i) the crowd of people that she saw had many people that she could not count and it was moving to Chikwepe Market while the tailoring shop that she was at is outside the market;
 - (ii) the First Respondent was pointed out to her, by a person she did not know, as the one wearing a khaki work suit;

(iii) she denied that the incident was a fabrication and stated that she did not refuse the money because of hunger and she used it to buy food for her children;

(iv) she worked as a maid;

(v) she confirmed having voted on 12th August 2021 unaccompanied by anyone and that no one showed her who to vote for but she knew she had been given money; and

(vi) she confirmed that she made the voting choices herself.

3.173 **PW14 was not cross examined** by the Second Respondents Counsel **nor was she re-examined** by the Petitioner's Counsel.

3.174 **PW 15 was Daniel Kajila** a 33 year old resident of Bulangililo.

3.175 **It was his evidence in chief** that on a day in July 2021, he left home and heard people shouting that Bonanza had come. He saw people running to Bulangililo School and he joined them and found them lining up to receive money from the First Respondent.

3.176 It was his testimony that the crowd was more than a hundred people and the gates of the school were eventually closed as people were just flocking in.

- 3.177 PW15 testified that when his turn arrived to receive money the First Respondent gave him K40 broken down in K20 notes and advised him not to forget to vote for him (First Respondent).
- 3.178 It was PW15's testimony that the First Respondent is well known even amongst children in Kwacha Constituency and that he (PW15) has grown up knowing the First Respondent.
- 3.179 PW15 testified that on another day in July 2021 he heard that "Bonanza" was going round all the markets. PW15 thus set off for Bulangililo Market at about 15 hours and found a lot of people but no queue.
- 3.180 He testified that upon inquiry he was informed that they were not giving money to everyone but traders. He was told this by PF cadres who were with the First Respondent and clad in party regalia.
- 3.181 PW15 testified that he thereafter left for home and when voting day came, he cast in favour of PF and the First Respondent since the latter had given them money.
- 3.182 **When cross examined** by Mr. Mumba, Counsel for the First Respondent, PW15 testified that-

- (i) he lived in Bulangililo, was registered as a voter at Bulangililo but did not know how many polling stations were there in the area;
- (ii) he also confirmed that Bulangililo market is not a polling station and that he did not know the number of registered voters at Bulangililo polling station;
- (iii) he also did not know whether all the registered voters were present at Bulangililo School during the meeting nor did he know who they voted for;
- (iv) he was aware that some people from Bulangililo voted at other stations;
- (v) as for the incident at Bulangililo market in July 2021, he met the First Respondent there but did not speak to him only to the cadres who he could not identify;
- (vi) he met the cadres for the first time that day and knew that they were agents for the First Respondent;
- (vii) on voting day, many people turned up at Bulangililo Polling Station;
- (viii) he went alone to vote and was unaccompanied even in the booth as he chose who to vote for; and

(ix) when he was in the Polling Station, he did not see anyone being accompanied in the booth.

3.183 **PW15 was not cross examined** by Counsel for the Second Respondent.

3.184 **When re-examined**, PW15 testified that the cadres at Bulangililo market were agents of the First Respondent as they wore green work suits and boots.

3.185 **The First Respondent, Joseph Malanji (RW 1) testified** as the first witness on his own behalf.

3.186 **When examined in chief** he testified that he was a 57 year old resident of Roma in Lusaka, a businessman and politician by occupation.

3.187 He testified that the allegations levelled against him of abuse of his past office as MP for Kwacha Constituency were misplaced as he was a law abiding citizen confined to behave in accordance with his status as:

- (i) a gazetted ambassador;
- (ii) immediate past foreign affairs Minister; and
- (iii) immediate past president of the Africa Golf Federation.

3.188 It was his testimony that he has done a lot for the residents of Kwacha constituency from his personal resources over the years including:

- i) building schools, clinics, police stations complete with brand new vehicles;
- ii) provision of a hearse and two 70 seater buses for use by the public during funerals with drivers paid for by his office;
- iii) donations of money of about K60,000 to church congregations that he visits for them to buy lunch for all congregants;
- iv) purchase of Rosa buses for all mother churches in the constituency;
- v) donating an S 350 Mercedes Benz to a parish priest; and
- vi) provision of monetary grants to the marketeers in the constituency which serve as a revolving fund without need for them to borrow from multinational microfinance companies.

3.189 It was his testimony in chief that his generosity stems from his upbringing that he always helps out in the community when he can as most of the times afford the extra expense.

- 3.190 He testified that he was indeed referred to as "Bonanza" in the community in appreciation of his generosity. He also stated that he was the proud owner of two aircraft.
- 3.191 It was his testimony that he was a household name in the constituency and so spent more time campaigning in other parts of Zambia as he was confident of retaining his seat as MP.
- 3.192 He said he visited the constituency not more than 10 times during campaign period and did not see the need to even print campaign poster but for his constituency official's insistence.
- 3.193 As for the development projects complained of by the Petitioner, the First Respondent testified that he did not take advantage of the CDF allocated to Kwacha Constituency to campaign for himself after dissolution of Parliament.
- 3.194 It was his testimony that there is a committee for CDF which is constituted every 5 years for a constituency and ratified by the Ministry of Local Government. The committee has more than 10 members who include council employees.
- 3.195 When there is an intended project, communication moves from MP's office to the CDF committee which analyses them including availability of resources.

- 3.196 The CDF committee refers the project to the Council for onward transmission to the Ministry. If approved by the Ministry, the project will then be advertised for tender purposes either by the Council or with consent of ZPPA depending on the value threshold.
- 3.197 The Council acts as the agent of the Ministry and the projects continue with or without an MP as the ultimate authority is the Ministry.
- 3.198 He testified that he could not stop projects which were not under his authority.
- 3.199 It was his testimony that the clinic at Ipusukilo was accordingly developed in that manner though the idea was mooted 3 years ago but not implemented due to funding constraints.
- 3.200 He testified that as for the Kwacha East Market stalls they were built 3 years ago, but the Council Health department refused to its opening without an ablution block which the council then had to build.
- 3.201 It was his testimony that he did however build some of the developments from his personal resources like the maternity

ward at Bulangililo which construction works stopped during campaign period and have not continued since.

3.202 He also built a small bridge at Bulangililo Market in April 2021 not during campaign period that it took him two weeks to do. He denied having gone to commission the bridge as according to him it was too small a project for a ribbon cutting event.

3.203 He denied having been involved in acts of violence in the constituency saying that he told his supporters and agents to avoid it as he was confident of victory and the violence would dent his reputation.

3.204 The First Respondent's demeanor was however unconvincing on this point as he looked away from the Court as he testified.

3.205 With a similar unconvincing demeanor of facing away from the Court, the First Respondent denied involvement in the VML incident of 31st May 2021 and that he instructed the attackers to do what they did. He stated that he was out of town on the day in Chisamba, Chibombo then Itezhi-tezhi.

3.206 As for the incident of Police presence at Musonda Compound in July 2021 and his alleged presence with Mr. Christopher Kangombe, the First Respondent testified that he did not instruct the Police to go there. He further stated that his

relationship with the police was just like any citizen who called on their services if aggrieved.

3.207

He also testified that he was not with Mr. Kangombe in Kwacha Constituency as the latter was a new comer unlike him (First Respondent) who was a seasoned politician such that any political activity involving the two would have been in Mr. Kangombe's constituency for support not Kwacha Constituency. Further that he was on the day out of town flying from Ikelenge to Solwezi.

3.208

As for the alleged incident of 18th July 2021 at Kapoto Market, the First Respondent confirmed that he was there on the day but that he went to buy relish/chickens for his campaign foot soldiers where he was told it was K100 per chicken. He wanted 150 chickens to be divided between the wards and constituency office. The marketeers only had 47 chickens and he told them to organize themselves to source the full number of chickens required. He later also purchased fish, tomatoes and charcoal also from the locals as he believed in community pioneered development.

- 3.209 It was his testimony that when other residents in the area heard that he was around they started coming nearby as they heard that he was buying food stuffs from the market.
- 3.210 He personally did the purchases because he did not want excuses from his team over food for foot soldiers.
- 3.211 The First Respondent then looked away from the Court with unconvincing demeanour and added that he just waved at the on lookers and denied having dished out money to them as most people in the constituency already knew him.
- 3.212 As for the alleged incident of dishing out money at various places on 11th August 2021, he landed at Parklands Secondary School on return from Chinsali at about 15:40 hours and began a road show run covering the whole constituency. He was just waving at people and reached the end of the constituency 5 minutes before 18:00 hours/close of campaign period and he thanked his supporters and asked them to go home and prepare for voting the next day.
- 3.213 He then looked away from the Court in an unconvincing demeanor and added that he never went to any market on 11th August 2021 as he only had 1 hour 50 minutes so looking at the time and distance to be covered, it was not possible to go

to the markets or shops during the roadshow. It would have been chaotic to distribute money the day before voting and impossible to repair.

3.214 It was the First Respondent's testimony that he did not go to Bulangililo School to dish out money as alleged or at all the whole of the campaign period. He further testified that he last had a gathering there 3 years ago before COVID pandemic, complete with PA systems.

3.215 His demeanour was however unconvincing as he looked away from the Court as he testified on the point.

3.216 Whilst maintaining the same unconvincing demeanour, the First Respondent closed by stating that he was very careful in the way he handled himself in the election and had to behave in an exemplary manner befitting his status.

3.217 **The First Respondent was cross examined firstly by Mr. Z Sinkala, Counsel for the Petitioner, during which he testified:**

- i) he attended Chililabombwe Secondary School from 1981-83 and obtained a Form 3 certificate;
- ii) he also had a grade 12 certificate;
- iii) he never spoke of the two certificates in his testimony in chief;

- iv) he has not produced the two certificates before Court and he agreed for that reason that the Court would not know for sure that he actually had the two certificates;
- v) he has not provided a list of his nominated agents but disagreed that the Court would not be in a better position to know whether the persons whom the Petitioner complained of as violent were his agents;
- vi) he insisted that he had denied in his evidence in chief that the perpetrators of the violence complained of were his agents;
- vii) he had told his agents not to beat their political opponents including the Petitioner;
- viii) the said directive was to his agents and anyone with a tangible connection to his campaign;
- ix) he denied that he issued the directive because he knew that they had the capacity to beat his political competitors;
- x) he had not produced any documentary evidence to prove that he was flying from Ikelenge to Solwezi on 24th July 2021 and that he was in Chinsali on 11th August 2021 and as a result it was his word against that of the Petitioner's witnesses over his whereabouts on the two days;

- xi) he is a household name in Kwacha Constituency known by the residents except new comers;
- xii) he was seeing the Petitioner's witnesses for the first time in Court and has never had any altercation, argument or difference with any of them;
- xiii) when asked a follow up question about whether for that reason in (xii) the Petitioner's witnesses had no reason to give false testimony against him the First Respondent paused looked down and answered "no" with unconvincing demeanour;
- xiv) he admitted giving K15,000 to a marketeer chicken trader and that he did not get any receipt for it despite not being given the chickens there and then;
- xv) he has no documentary evidence on record to show that the K15,000 was actually given by him to the marketeer for chickens;
- xvi) he admitted that the second document in his bundle of documents just had a cover page and signature page which were independent documents which did not speak together and that he did not produce the parts which deal with terms and conditions;

- xvii) he however unconvincingly (looked away from Court) denied that in the circumstances the Court was prevented from knowing for sure the nature of the contract to which the signatures relate;
- xviii) he sits on the CDF committee as the MP and also sits in its meetings;
- xix) when the CDF committee sits there are usually minutes generated and signed off by the Chair and Secretary;
- xx) he has not produced minutes of the CDF meetings relating to the projects, the subject of the petition, specifically approving the market ablution block and the works at the clinic at IDECO;
- xxi) he has not produced any documentary records to prove when he constructed the bridge from his personal resources;
- xxii) he has also not produced a copy of the letter he said he wrote to Zambia Railways over the rail lines for the bridge; and
- xxiii) he did not publicly denounce the incidents of violence in Kwacha Constituency nor issue a statement on them whether in public, electronic, print media or his face book account.

- 3.218 **Under further cross examination**, this time by Mr. Kasaji, Co-Counsel for the Petitioner, the First Respondent testified that –
- i) his nickname is Bonanza because of his philanthropic and charitable works;
 - ii) he has not produced documentation in Court showing that he built the bridge from his own resources in April 2021;
 - iii) he has used the bridge numerous times and was there in July 2021 when people were shouting “Mwalibomba”;
 - iv) he denied that it was correct for PW2 to state that he saw him at the bridge with people in July;
 - v) he admitted visiting Kapoto market during campaign period and that he visited the chicken stands, gave them money and left without collecting any chickens;
 - vi) he admitted that it is correct that PW 2 saw him at the market at the chicken stalls giving money but leaving without the chickens and that the amount he gave was K15,000;
 - vii) during campaigns he would go to Bulangililo market which is a kilometre from Bulangililo Secondary School but he never went to the school;

- viii) the agreed bundle of documents filed on 23rd September 2021 at p. 3 shows that the school has 5 polling stations under it and exhibit "CAM 2" in the affidavit verifying facts shows that the First Respondent won at all the polling stations there;
- ix) he was in Kwacha Constituency on 11th August 2021 on a campaign roadshow from Mwaiseni via Chipata Compound all the way up to Kwacha Compound;
- x) he had many foot soldiers on the roadshow and did not know all of them individually and could not deny PW6's testimony that she was part of his crowd;
- xi) the police were an institution of Government and he was at number 5 in the government hierarchy;
- xii) his campaign team was on the ground campaigning for him after 17th May 2021 up to 11th August 2021 even when he was out of town;
- xiii) on 31st May 2021 his team was on the ground campaigning; and
- xiv) he was in Chisamba and Itezhi tezhi so he was not in a position to dispute the VML incident since he wasn't there.

- 3.219 **The First Respondent was not cross examined by Counsel for the Second Respondent.**
- 3.220 **When re-examined** by Mr. Mumba, the First Respondent clarified that based on the pleadings there was no requirement for him to produce his Grade 12 certificate or to state which school he got it from.
- 3.221 He did not produce a list of his nominated agents as it was not a prerequisite.
- 3.222 What he meant by telling his people not to beat their opponents was that they should not fight as it was not necessary.
- 3.223 He clarified that he did not produce receipts and other documents to show his out of town presence as he only learnt of their relevance whilst in Court.
- 3.224 One of the Petitioner's witnesses Chella had an altercation with his group so chances of him venting on the First Respondent through false testimony were high.
- 3.225 He did not get receipts from the marketeers as they have a constant relationship where he gets chickens from them regularly for funerals.

- 3.226 The terms and conditions of the contract in his bundle are not before Court as the issue was to determine the names of the vendor/buyer and the contractor.
- 3.227 As MP he sits on but does not chair CDF committee meetings. The minutes relating to the projects complained of have not been produced as what matters is who gives out the contracts and who supervises, which is the sole responsibility of the Ministry of Local Government through the Council.
- 3.228 He also clarified that he did not keep records over the bridge because it was financed by him with no accountability to anyone and also because he built it before campaign period. It is the same reason why he did not produce the letter to Zambia Railways.
- 3.229 He testified that there was no public forum available for him to publicly denounce violence.
- 3.230 His nickname is Bonanza because of the charity works in the constituency.
- 3.231 It is not correct what PW 2 said that the First Respondent went to the bridge with people as there are always vendors there who shout when he gets there.

- 3.232 He has a permanent relationship with the Marketeers as he deals with them every day that it is why he paid K15,000 and left without the chickens.
- 3.233 There were a lot of people on the roadshow running with him and some would join for only 500 metres and drop off so it was not possible for him to master every individual who was on the roadshow.
- 3.234 He clarified that he had not been to Bulangililo Secondary School the whole campaign period but only to Bulangililo Market which is within 1 kilometre away from the school. The school is a polling station so the First Respondent avoided it.
- 3.235 **RW2 was Brenda Kangwa** a 50 year old resident of Ipusukilo, Kitwe.
- 3.236 **She testified in chief** that she was a marketeer who sold chickens at Ipusukilo Market for a living.
- 3.237 It was her testimony that on 11th August 2021 the First Respondent appeared at her stand in a motor vehicle and inquired on the price of each chicken to which she advised K100. The First Respondent told her he wanted 150 chickens and asked her to calculate the price which she did and told him it was K15,000.

3.238 She testified that the First Respondent gave her K15,000 cash and inquired whether her stock at the stand was enough to meet his demand to which she advised that she had more chickens at home to meet the shortfall.

3.239 RW2 stated that the First Respondent said he would send two men to collect them and asked if she knew the two to which she said she knew the one called Ernest.

3.240 RW2 closed her evidence in chief by stating that the First Respondent ask her if the chickens would be ready by tomorrow and if he could send Ernest and she agreed.

3.241 **When cross examined by Mr. Sinkala for the Petitioner,**
RW2 testified that –

(i) she received K15,000 from the First Respondent on 11th August 2021 in exchange for 150 chickens to be supplied by her;

(ii) she only had 85 chickens at the stand and many more at home and she gave both the 85 and the balance to Ernest the next day;

(iii) she agreed that if someone said or testified that she had 47 chickens at the stand when the First Respondent came, they would not be telling the truth;

- (iv) there were 3 chicken traders at the market namely RW2, Hellen Kangwa and Lane Phiri;
- (v) she agreed that if someone testified that the K15,000 of 11th August 2021 was to be shared amongst them they would be lying;
- (vi) the First Respondent did not ask RW2 and the two traders to supply the chickens but only RW2 alone and it was around 14:00 – 15:00 hours;
- (vii) she sold 150 chickens to the First Respondent only once this year; and
- (viii) the only people around who saw her receive the K15,000 were her fellow two chicken traders.

3.242 **When cross examined by the Second Respondent's Counsel**, RW2 testified that she received K15,000 from the First Respondent as the price of the 150 chickens.

3.243 **RW2 was not re-examined.**

3.244 **RW3 was Raja Mwewa Chiluba**, a 58 year old resident of Wusakile, Kitwe.

3.245 **He testified in chief**, that he did not know why he was before Court as he was just called to attend by the First Respondent.

3.246 It was his testimony that he was the head teacher at Bulangililo Secondary School and that there was no campaign meeting that took place at his School between 17th May 2021 and 11th August 2021 for any political party.

3.247 He testified that he even has a log book at the school where any such activities are noted.

3.248 It was his evidence that he knew the First Respondent and that he never came to the school during the period.

3.249 **Under cross examination by Mr. Sinkala**, for the Petitioner, RW3 testified that-

- (i) he did not know why he had come to Court and was called by the First Respondent;
- (ii) he has taught at Bulangililo Secondary School for 2 years 3 months and known the First Respondent for the same duration;
- (iii) he has maintained a very healthy relationship with the First Respondent as area MP and they had each other's telephone numbers to constantly be in touch if need be;

- (iv) schools had been closed due to COVID 19 and exam classes opened in July 2021 while non- exam classes opened on 15th August 2021;
- (v) prior to that the school was closed for the whole of June and part of July 2021;
- (vi) the school was open by late July 2021 but he does not know the exact date;
- (vii) he has not told the Court where he was between 17th May 2021 to 11th August 2021;
- (viii) there is an attendance register where it is recorded when teachers and support staff report at the school including during breaks;
- (ix) the register was not before Court and it was therefore difficult to tell which worker or teacher was present at school during the period 17th May 2021 to 11th August 2021; and
- (x) the log book where events at the school are recorded is not before Court and thus the record before Court of whether the First Respondent was ever at the school is incomplete.

- 3.250 **RW3 was not cross examined** by Counsel for the Second Respondent.
- 3.251 **When re-examined**, RW3 testified that when he was called to come to Court, he was not told that the log book and register were required and would have come with them had he been told. They are however there at school and the log book can be presented and it will show that what he had stated is correct
- 3.252 **RW4 was Derbson Makayi**, a 46 year old Police Officer.
- 3.253 **It was his testimony in chief**, that he was the Officer in charge at Riverside Police Station but only reported there on 1st July 2021.
- 3.254 He testified that the records that they found showed that on 31st May 2021 some people who identified themselves as UPND cadres came to report that they had been assaulted by suspected PF cadres. They were given medical forms and told to return after endorsement at the hospital but they never returned.
- 3.255 It was his evidence that the records show that on the same day people calling themselves PF cadres came to report that they had been assaulted by suspected UPND cadres. They were

given medical forms and told to return after endorsement at the hospital but they did not.

3.256 RW4 further testified that another notable event was that in July 2021 Riverside Police received a report from two men calling themselves PF cadres complaining of being assaulted by a UPND cadre called Chella. They were given medical forms but never returned to the Police Station.

3.257 There was also a report of stone throwing and noise at Musonda Compound but a check by officers found that the people had dispersed.

3.258 RW 4 testified that he and the officers never stopped any door to door campaign with over 300 officers and never even went for the patrol. They were only 77 officers at the station.

3.259 It was his testimony that on 12th August 2021 a man reported that he received a call of suspected PF cadres making noise in Musonda Compound but when officers got there, they found it quiet.

3.260 He stated that other than that, Kwacha Constituency had a favorable mood during campaigns and the security situation was quiet. There was free movement of people and they never received bad reports from the polling stations on voting day.

3.261 **When cross examined by Mr. Sinkala** for the Petitioner, RW4 testified that –

- i) on the incident of 31st May 2021, he was relying on what he read in the occurrence book but he did not produce it as evidence before court;
- ii) during campaigns the Police was issuing permits to various political parties but he has not produced copies of any permits issued to the Petitioner to allow him to campaign;
- iii) he has not produced any record of alleged assault by Mr. Chella;
- iv) he was present to check for violence the two times that officers received reports but has not produced in Court the resultant reports that he did to his seniors;
- v) had he produced the reports it would have proven what he said about how peaceful things were on the scene; and
- vi) in the absence of records before Court all that is there is his evidence that things were calm versus the Petitioner's evidence of violence and police intimidation.

3.262 **RW4 was not cross examined** by the Second Respondent's Counsel.

- 3.263 **When re-examined**, RW4 testified that the occurrence book with records of all incidents was brought to court but not produced.
- 3.264 **RW5 was Seke Mbulo**, a 49 year old resident of Parklands, Kitwe.
- 3.265 **It was his testimony in chief** that he was the Town Clerk at Kitwe City Council in charge of overseeing and supervising operations.
- 3.266 He testified about CDF which is a disbursement by the Ministry of Local Government to all local authorities to carry out development work in constituencies.
- 3.267 It was his testimony that CDF is a form of decentralized decision making as while funds are disbursed to a Council account, the decision of which project to implement lies with the CDF committee instead of the Council as the centre.
- 3.268 RW5 testified that the composition of the CDF committee is:
- a) area MP;
 - b) 1 councilor nominated by the MP;
 - c) 2 councilors selected by fellow councilors;
 - d) 2 community leaders nominated by the MP;
 - e) representative of the Council's director of city planning;

- f) representative of the Council's director of engineering services;
- g) representative of the council's director of finance; and
- h) representative of the chief if in an area where there is a chiefdom.

3.269 The nominee's names are sent to the Ministry for approval which comes in form of a circular. The CDF committee then selects projects subject to approval by the Ministry before implementation by the Council.

3.270 RW5 testified that if a project is selected the Town Clerk conveys it to the Minister attaching minutes of the meeting which deliberated on it and selected it as well as the value. The approval from the ministry comes in form of a circular after which the Council implements beginning with procurement through tender process.

3.271 It was his testimony that the project is then supervised by planning and engineering department of the Council throughout its implementation.

3.272 Once completed the director of engineering services issues an interim completion certificate recommending payment.

3.273 RW5 testified that in relation to the matter before Court the maternity ward at IDECO clinic was one of the projects selected by the CDF committee in Kwacha Constituency, approved by the ministry and implemented by the Council. It was the same with the Kwacha East Market shelter and the ablution block as well as with the bridge at Bulangililo.

3.274 RW5 testified that the CDF Act does not mention anything about campaign period and cessation of implementation. As a result, implementation of the 3 projects in issue continued regardless of campaign period or not.

3.275 The Council did so as custodian of CDF and implementor of projects.

5.1 **When cross examined** by Mr. Sinkala for the Petitioner RW5 testified –

(i) he agreed that to the extent that an MP nominates some of its members he wields significant influence in a CDF committee;

(ii) District Development Committees were creatures of the 2006 CDF guidelines but were left out of the CDF Act No. 11 of 2018 and have no place at present;

(iii) Disbursement of CDF is erratic and not consistent depending on availability of funds at the central government;

(iv) he agreed that he had not stated how CDF was disbursed for Kwacha Constituency over the past 5 years;

(v) in his time as Town Clerk, he had heard of money for CDF being returned to the treasury because a project could not be approved and he had also seen auditors reports of unapproved projects being funded, but none of them related to Kitwe district;

(vi) he had no knowledge of misappropriation of CDF funds in Kwacha;

(vii) he confirmed that the 3 projects in issue namely:

- a) maternity ward;
- b) market stalls and ablution; and
- c) a bridge.

were constructed using CDF.

(viii) he agreed that when a market is constructed, residents of the constituency would credit the MP, Councilor and sometimes the President;

- (ix) he agreed that at constituency level an MP receives a lot of credit for development works and is deemed to be very hardworking;
- (x) the First Respondent is no exception as when the market stalls, maternity ward and bridge were constructed the residents were elated and deemed him to be a hardworking person;
- (xi) he agreed that the first contract exhibited in the First Respondent's bundle for the maternity ward had a start date close to beginning of campaigns and an end date after elections;
- (xii) the start date of the second contract in the First Respondent's bundle had a start date closer to a month before campaign period and a completion date within campaign period;
- (xiii) he agreed that the 3 projects were largely attributed to the First Respondents as the one who brought the developments;
- (xiv) meetings of CDF committees are supposed to be followed by minutes and the Ministerial approval of projects required a circular; and

(xv) he agreed that he had not produced the minutes of the CDF committee and the circular for ministerial approval of the projects.

3.276 **RW5 was not cross examined by the Second Respondent's Counsel nor was he re-examined by the First Respondent's Counsel.**

3.277 **RW6 was Sherry Chuba, a 63 year old resident of Kwacha Kabwe. She testified in chief that she was a marketer by occupation who was in Court to answer questions over the case of the MP.**

3.278 It was her evidence that on 11th August 2021 she was selling at a shelter outside the market between the hours of morning up to 18:00 hours.

3.279 She testified that at about 17:00 hours she heard noise of a group of people and she went to check it out at the roadside along Kwacha Road. She then saw the First Respondent moving from First Kwacha towards Bulangililo with the crowd.

3.280 It was her testimony that the First Respondent was distributing PF regalia in form of chitenges and caps and that he never stopped.

3.281 **When cross examined by Mr. Sinkala**, for the Petitioner, RW 6 testified that –

i) it would be a lie if someone told the Court that on 11th August 2021 at the time she described, the First Respondent did not stop at Kwacha Market or along the road to distribute chitenges; and

ii) the First Respondent was just passing and distributing chitenges, but never stopped.

3.282 **RW6 was not cross examined by** Counsel for the Second Respondent **nor re-examined by** Counsel for the First Respondent.

3.283 **RW7 was Prisca Musanshiko**, a 52 year old resident of Garneton, Kitwe. **She testified in chief** that she was a marketeer and that she did not know anything about the dates 18th May 2021 and 11th August 2021 but only the events of 3rd August 2021. On the said day she saw the First Respondent and two young men visit her stand and inquire about the price of rice and soya chunks which she advised to be K65 and K5 respectively.

3.284 It was her testimony that the First Respondent asked her to pack rice for K65 and soya chunks for K35 and she did and he paid her K100. The goods were loaded in a sack by his men.

3.285 She testified that she was based at Ipusukilo Market in Kapoto and sold along the road that leads to Zambeef.

3.286 She told the Court that the events she narrated never occurred any other day.

3.287 **When cross examined by Mr. Sinkala RW7 testified that –**

i) she had not told the Court whether she traded at the Market on 4th August 2021; and

ii) agreed that the Court will never know whether she was at the market on 4th August 2021 since she did not say so.

3.288 **RW7 was not cross examined by Counsel for the Second Respondent nor was she re-examined by Counsel for the First Respondent.**

3.289 **RW8 was Muposhi Katai** a 27 year old resident of Kwacha East Kitwe.

3.290 **He testified in chief** that he was a trader with a small shop and also the Councilor for Musonda Ward having been

amongst the 6 contestants and polled 2,254 votes as against his closest competitor from UPND who had 1,913.

3.291 It was his testimony that 18th May 2021 to 11th August was campaign period and that following a bereavement he left Kitwe for Chingola on 30th July 2021 and returned on 1st August 2021 which he spent resting at home.

3.292 On 2nd August 2021 he rejoined the campaign team in the ward and found that they had run out of food. RW8 contacted the First Respondent who refused to give money saying he was not giving money to any Councillor.

3.293 RW8 testified that the First Respondent opted to go in person to Kapoto Market where RW8 was too and the First Respondent inquired about the price of chickens and was told K100 and then he requested for 150 chickens.

3.294 RW8 testified that the First Respondent then gave the woman selling K15,000 and got the chickens which he took to the constituency through Ernest Mwansa, the Youth Chairman. The chickens were then distributed amongst the wards and the constituency offices of PF.

- 3.295 RW8 testified that the next day he was called to the constituency to collect mealie meal which he did and they went for door to door campaign from there.
- 3.296 It was RW8's testimony that on 11th August 2021 there was a roadshow for the last day of campaigns.
- 3.297 RW8 testified that it was also the last day for the First Respondent to campaign since he had been the national campaign manager for the then President.
- 3.298 The roadshow began at about 14 hours when the First Respondent arrived and they proceeded on foot with the vehicles following behind. RW8 was part of the group and so was the Mayoral candidate. They walked along the road and a lot of people turned out.
- 3.299 RW8 testified that after Musonda Ward, the roadshow proceeded to Ipusukilo then Bulangililo before ending in Kwacha where he parted company with the First Respondent around 18 hours when campaigns closed.
- 3.300 It was RW8's testimony that during campaign period he campaigned peacefully and without violence and corruption.
- 3.301 He also testified that the First Respondent never gave him any position since he was also a candidate.

3.302 RW8 testified that the First Respondent instead had other people as his agents such as Ernest Mwansa, David Mensa and Alex Chembo.

3.303 **When cross examined by Mr. Kasaji for the Petitioner, RW8 testified that -**

i) he described events from 31st July 2021 to 11th August 2021;

iii) the Court will never know how he spent 30th May 2021 and 27th July 2021;

iv) since he contested as a Councilor in Musonda Ward, it is correct to say that if someone described a Mr. Katai as a Councilor, they would be referring to him;

v) the First Respondent was his boss as MP of the constituency where his ward lies and member of the same party; and

vi) the First Respondent bought the 150 chickens on 2nd August 2021 at about 14:00 hours so it would be a lie if someone said it happened on 11th August 2021.

3.304 **Under further cross examination, this time by Mr. Sinkala, also for the Petitioner, RW8 testified that-**

- (i) he met the First Respondent on 11th August 2021 at 14:00 hours at 72 kapompi, Nkana East and at 15:00 hours they were in Chipata Compound on the roadshow;
- (ii) by 16:00 hours they were proceeding to Ipusukilo Ward, by 17:00 hours they were in Bulangililo and between 17-18 hours they were in Kwacha ward where they eventually dispersed;
- (iii) the roadshow took about 4 hours in total;
- (iv) the First Respondent did not lie when he said he only landed in Kitwe from Chinsali at 15:40 hours and he RW 8 was not lying when he said that he met the First Respondent at 14:00 hours;
- (v) he denied that the time difference between 14:00 hours and 15:40 hours is 1 hour 40 minutes; and
- (vi) the roadshow entailed the First Respondent just walking in front of vehicles and this is what happened only in Musonda Ward.

3.305 **RW8 was not cross examined by the Second Respondent's Counsel.**

3.306 **When re-examined, RW8 testified that he was not asked any questions about 21st July 2021 so did not describe its events.**

- 3.307 The First Respondent is his boss because they are in the same party and Councilor is lower than MP.
- 3.308 The roadshow took 4 hours because when the First Respondent came his watch said 14 hours and they went on the roadshow up to 18 hours.
- 3.309 RW8 closed off by stating that the First Respondent was not lying as he was in Chinsali and then he came back.
- 3.310 **RW9 was Alex Chembo** a 53 year old resident of Kwacha, Kitwe. **It was his testimony in chief** that he was before Court to testify about the election of the First Respondent for whom he was the assistant campaign manager.
- 3.311 RW9 testified that he escorted the First Respondent from date of nomination onward as a supporter. Rallies were not allowed so they improvised by connecting a sound system and driving around the wards telling people of the First Respondent's works in the constituency and lobbying for their vote to re-elect the First Respondent to do further works.
- 3.312 It was RW9's testimony that the campaign period was peaceful and had no violence right up to the end on 11th August 2021. The reports that he received from the wards were that the situation was calm without fights or violence.

- 3.313 He also testified that the campaign by his team was free and fair and they never suppressed anyone.
- 3.314 According to RW9, sometimes they would run into people from other parties and they would pass each other freely.
- 3.315 He testified that he never received any complaint to go to the Conflict Management Committee nor did he receive any report of PF members being summoned to the Police for beating someone.
- 3.316 This atmosphere he said prevailed from nomination day up to 12th August 2021.
- 3.317 RW9 spoke about the roadshow of 11th August 2021 saying that he had advised the First Respondent who was in Northern Province that there was need to have it by running and waving at people.
- 3.318 It was his testimony that the First Respondent arrived at about 16 hours and they began the roadshow from Mwaiseni with David Mensa as campaign manager behind distributing caps and shirts.
- 3.319 They reached Musonda at 16:30 and stopped over at Kapompi bridge. They moved on to Kapoto and reached Kwacha ward at about 17:40 hours.

3.320 The First Respondent then got a microphone and thanked the people for having walked with them from Mwaiseni to Kwacha. They dispersed thereafter.

3.321 RW9 testified that on voting day 12th August 2021, he went around to inspect that PF polling agents were at the stations and he found a calm mood with people freely lining up.

3.322 **When cross examined by Mr. Sinkala** for the Petitioner, RW9 testified that-

(i) during campaigns he was reminding the Kwacha people of the many works that the First Respondent had done for them;

(ii) the works included a 1x3 classroom block at Valley View School, 1x3 classroom block at Riverside Extension Primary School, a community bus for mourners, a hearse, and a lot of other things including donations of buses to churches;

(iii) the First Respondent did not build any market during campaigns nor did he build an ablution block at Bulangililo or a bridge;

(iv) he (RW9) is not a police officer and he agreed that incidents of violence are reported to the Police; and

(v) he however disagreed that only the police could confirm the status and mood of campaigns up to voting.

3.323 **RW9 was also cross examined by Mr. Kasaji** for the Petitioner during which he testified-

(i) he was not aware of any incident at VML of 31st May 2021 and never received any report of it; and

(ii) he however denied that there was a possibility of other incidents that he was not aware of.

3.324 His demeanor in this second round of cross examination was however not convincing as he looked up and away from the Court before each answer.

6.1 **RW9 was not cross examined by Counsel for the Second Respondent nor re-examined by the First Respondent who through him closed its case.**

3.325 **RW10 was Felix Mwila Mwila**, a 49 year old resident of Parklands, Kitwe, who testified as the sole witness for the Second Respondent.

3.326 **It was his evidence in chief** that he was the substantive Assistant director Human Resource and Administration (HRA) at Kitwe City Council and also acting director HRA.

- 3.327 He testified that during the general elections of 12th August 2021, he was the gazette returning officer for Kwacha Constituency.
- 3.328 RW10 stated that paragraph 4 of the petition was a true reflection of what transpired that the 4 named persons successfully and validly filed their nominations for the Kwacha Constituency election.
- 3.329 As for paragraph 7 a) of the petition, RW10 testified that Gen 20 forms were issued at the 91 polling stations in Kwacha Constituency and then transmitted to the totaling centre at Riverain Primary School. The totalling was then done in the presence of agents of political parties, the media and other stakeholders.
- 3.330 RW10 testified that it would be speculative for him to comment generally on the allegation in paragraph 7 a) of the petition as he needed to be told specific polling stations out of the 91.
- 3.331 As for 7 b) of the petition, RW10 testified that when the totalling was done in the presence of stakeholders, he did not receive any such complaints and that further, before the results were announced they were verified and signed for by the stakeholders.

- 3.332 Turning to the allegation in 7 c) of the petition, he did not receive any such formal complaint from the stakeholders. The only complaint he received was from the Petitioner on 14th August 2021 at the totaling centre demanding for a recount.
- 3.333 RW10 testified that he advised the Petitioner to come with a lawyer so that he (RW10) could explain the electoral process in the presence of the lawyer. After 2 hours the Petitioner returned with his lawyer and RW10 explained that a recount was not possible at the totaling centre but only at a polling station albeit before announcement of results or declaration thereof in line with the EPA No. 35 of 2016.
- 3.334 RW10 testified that the explanation was done in the presence of the District Electoral Officer too and thereafter a formal letter was done requesting for the recount to which RW10 responded as returning officer.
- 3.335 RW10 testified that the letter requesting for a recount and his written response are respectively exhibited as "CAM 4" and "CAM 5" in the Petitioner's affidavit verifying facts.
- 3.336 **When cross examined by Mr. Sinkala** for the Petitioner RW10 testified that-

- i) the candidates whose names appear in paragraph 4 of the petition validly filed their nominations with him and did successfully present all requisite documents for being elected for Kwacha Constituency;
- ii) the nomination papers are with the office of the Town Clerk as District Electoral Offices but he (RW10) can access them;
- iii) he is the one who received the nomination papers;
- iv) he agreed that because of the Petitioner's allegation that the First Respondent did not have a G12 certificate and the First Respondent's denial of the allegation, the Second Respondent as custodian of the nomination papers of the First Respondent was duty bound to bring them to Court to settle the dispute;
- v) the dispute would have been settled by the Court going through the nomination papers and satisfying itself whether a G12 certificate was amongst them;
- vi) the Court was not however in an awkward position and he disagreed that the Court will never know for a fact that the First Respondent possessed a grade 12 certificate;

- vii) he agreed that the Second Respondent had not brought the G12 certificate to the Court;
- viii) the nomination of a candidate can be challenged in Court for valid reasons which include the absence of a G12 certificate;
- ix) nomination can be challenged for non-compliance;
- x) he agreed that just because he as returning officer received nomination papers it does not mean that there is full compliance and it cannot be challenged; and
- xi) he agreed that the nomination can still be challenged.

3.337 **When cross examined by Mr. Kasaji** also for the Petitioner RW 10 testified that –

- i) he was the returning officer for Kwacha Constituency;
- ii) he received Gen20 forms from all 91 polling stations generated by the presiding officers at each station;
- iii) he agreed that the structure of the Gen 20a form is such that it must contain:
 - a) name of presiding officer;
 - b) name of polling station where generated;
 - c) name of constituency;
 - d) results of candidates in figures and words; and

e) signature of the presiding officer.

iv) he agreed that a Gen 20 form that does not contain the said details was invalid.

3.338 **When cross examined by Mr. Mumba** for the First Respondent RW10 testified that-

(i) on 17th May 2021 he as returning officer accepted the nomination of the First Respondent and thereafter there was no legal challenge of the nomination; and

(ii) there is a limited period for challenging a nomination which period expired and there was no challenge even thereafter.

3.339 **RW10 was re-examined** by Counsel Imonda and clarified that the Electoral Process Act provides that a petition challenging nomination can be lodged within 7 days from date of nomination and that it was the period that he referred to.

3.340 The said testimony marked the close of the Second Respondent's case.

4. THE LAW ON CHALLENGING PARLIAMENTARY ELECTIONS

4.1 The law relating to the subject is largely codified with the primary legislation being the **Electoral Process Act** No. 35 of 2016 (the “**EPA**”). Some of the salient provisions of relevance to this case are:

- (i) an interested person may petition the High Court to challenge the outcome of a parliamentary election within 14 days of the results (s.96 (1),97 (1) and 100 (3));
- (ii) interested persons for that purpose/with locus to petition include (s. 98) –
 - a) registered voters;
 - b) persons who were eligible to be nominated to contest in the election;
 - c) candidates who contested in the election; and
 - d) the Attorney General;
- (iii) there are three grounds on which parliamentary election results can be nullified –
 - a) misconduct committed by the victorious candidate (or for which they or their official agent are blameworthy) which misconduct hindered or may have hindered the

majority of the electorate in voting for their preferred candidate (s.97(2)(a);

b) procedural irregularity in the conduct of the election which affected the outcome (s. 97 (2) (b)); and

c) eligibility of the victorious candidate (s. 97 (2)(c)).

(iv) the High Court must determine the petition within 90 days of filing and either declare the election result as void or declare any candidate as duly elected (s. 99 and s. 106(1)).

4.2 I will now proceed to examine the grounds for nullification in detail and also the burden of proof.

Misconduct

4.3 Section 97(2)(a) of the **EPA** reads:

“97. (1) —.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that

candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;" (Emphasis added)

4.4 The **EPA** goes further to particularize some of the forms of misconduct as:

- (i) bribery (s.81)
- (ii) impersonation (s. 82)
- (iii) undue influence (s. 83)
- (iv) publishing false statements about opposing candidates (s. 84)
- (v) tampering with ballot boxes/paper (s. 87)
- (vi) solicitation or lobbying for votes on election day within 400 metres of a polling station (s.89(1)(e)).

4.5 The said provision is to be read with the proviso under 97(3) which stipulates:

"Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court or a tribunal further finds that such candidate has proved that—

- (a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election*

- agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;
- (b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and
 - (c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.”

4.6 Section 97(2)(a) of the EPA was the subject of judicial interpretation by the Constitutional Court in the case of *Nkandu Luo & ECZ v Doreen Sefuke Mwamba & AG*¹ wherein it was pronounced:

“As earlier stated, we have in unequivocal terms, stated our position on the above provisions. In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a), there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the Court, that the person whose election is challenged personally or through his duly appointed election or polling agents committed a corrupt practice or illegal practice or other misconduct in connection with the election; or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent. Sections 81-95 in Part VIII of the Act and also the relevant provisions of the Electoral Code of Conduct outline the

¹ Selected Judgment No. 51 of 2018 at p. J50-51

corrupt or illegal practices or misconduct in the electoral process.

In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice. (Emphasis added)

4.7 It can therefore be concluded that as far as misconduct (in a Parliamentary election challenge) goes, a petitioner must prove:

- (i) **there was an act of misconduct** relating to the election;
- (ii) **the actor** was either a candidate or someone else clothed with the knowledge, consent or approval of the candidate or that of their election or polling agent (in other words a connection or link of culpability between the misconduct and a candidate);
- (iii) **the magnitude** of the act of misconduct was that it was widespread; and
- (iv) **the effect of the act** was that it prevented/swayed or may have prevented/swayed the majority of voters in the constituency from electing their preferred candidate.

Procedural irregularity

4.8 Section 97(2)(b) of the EPA stipulates:

“97. (1) ---.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a)---

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election;” (Emphasis added)

4.9 The above provision is to be read with the proviso under s.97(4) which states:

“4. An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer’s official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.” (Emphasis added)

4.10 The learned authors of **Halsbury's Laws of England**² explain what is meant by 'the result' in a challenge of the election procedure as:

"The result means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate." (Emphasis added)

4.11 The said authors go on to cite the case of **Clare, Eastern Division Case**³ as authority for the proposition.

4.12 As for what amounts to substantial conformity with the law, the English case of **Morgan & Ors. v Simpson & Anr.**⁴ is useful because of the similarities between s.37(1) of the Representation of People Act, 1949 and s. 97(4) of our **EPA** and I quote Stephenson, L.J. who succinctly put it that:

"For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot."
(Emphasis added)

² 5th Edition (2013) Volume 38A (Elections and Referendums), Lexis Nexis: London at p. 176, footnote 4

³ (1892) 4 O'M & H 162 at 164

⁴ (1974) 3 All ER 722 at 731 from line h

4.13 The principle has been applied in Zambia in ***Sibongile Mwamba v Kelvin M. Sampa & Anr.***⁵ where the Constitutional Court endorsed the said English case before pronouncing:

“This shows that the threshold is high if the Court is to nullify an election based on the fact that the election was not conducted substantially in conformity with the law. It should be of such a scale or level or of such a nature that it can be said to amount to a travesty of an election or a sham.” (Emphasis added)

4.14 It is therefore incumbent upon a petitioner relying on this ground to:

- (i) specify a provision of the **EPA** (or related legislation, primary or secondary) which prescribes an electoral process/procedure;
- (ii) prove that there was an occurrence(s) in respect of the election which occurrence did not comply with that procedural prescription; and
- (iii) prove that due to the occurrence(s) the election was a sham or travesty as it was not conducted substantially in accordance with the **EPA**; and

⁵ Vol 3 (2007) ZR 284 at 316 -317

- (iv) prove that the procedural anomaly affected the outcome of the election in terms of the success of one candidate over the other(s).

Eligibility

4.15 The **EPA** in s.97(2)(c) stipulates:

“(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.”

4.16 The qualifications for election as MP are prescribed in Article 70(1) of the **Constitution of Zambia** (the “**Constitution**”) as:

“(1) Subject to clause (2), a person is eligible to be elected as a Member of Parliament, if that person-

- (a) is a citizen;*
- (b) is at least twenty-one years old;*
- (c) is a registered voter;*
- (d) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent; and*
- (e) declares that person’s assets and liabilities, as prescribed.” (Emphasis added)*

4.17 The grounds for disqualification from being elected as MP are also codified and I cite the provisions of Article 70(2) of the **Constitution** as:

“(2) A person is disqualified from being elected as a Member of Parliament if that person

- (a) *is validly nominated as a candidate in a presidential election;*
- (b) *is a public officer or Constitutional office holder;*
- (c) *is a judge or judicial officer;*
- (d) *has a mental or physical disability that would make the person incapable of performing the legislative function;*
- (e) *is an undischarged bankrupt;*
- (f) *is serving a sentence of imprisonment for an offence under a written law;*
- (g) *has, in the immediate preceding five years, been removed from public office on grounds of gross misconduct; or*
- (h) *holds or is acting in an office, as prescribed, the functions of which involve or are connected with the conduct of elections.”*
(Emphasis added)

4.18 Quite clearly, a petitioner seeking nullification of a Parliamentary election result under s. 97(2) (c) of the **EPA** must prove that on the day of voting the victorious candidate was ineligible for election as either:

- (i) they did not meet the qualifications set by Article 70(1) of the Constitution; or
- (ii) they were otherwise barred from being elected because of their status which falls in the categories listed in Article 70(2) of the Constitution.



Burden and standard of proof

- 4.19 In *Galaunia Farms Limited v National Milling Company Limited*⁶, the Supreme Court re-affirmed that the burden of proof in a civil case lies with he who alleges.
- 4.20 Closer to this case is the decision of the Constitutional Court in *Nkandu Luo & ECZ v Doreen Sefuke Mwamba & AG*⁷ earlier cited, wherein it was categorically stated that onus is on a Petitioner to prove that there is cause for nullification of a parliamentary election under section 97(2) of the **EPA**.
- 4.21 Turning to the standard of proof, the Supreme Court in *Mwalimu Simfukwe v Evaristo David Kasunga*⁸ (decided prior to enactment of the **EPA**) did canvass the principle that the standard of proof to be discharged by a petitioner in election petitions is higher than on a balance of probabilities.
- 4.22 The said case was cited and the principle entrenched by the Constitutional Court, post enactment of the **EPA** in the decision in *Abiud Kawangu v Elijah Muchima*.⁹

⁶ (2004) ZR1 at pages 9-10

⁷ Selected Judgment No. 51 of 2018 at p. J50-51

⁸ Appeal No. 50 of 2013

⁹ Judgment dated 9th February 2018 in Appeal No. 8 of 2017 (2016/CC/A039)

4.23 It follows therefore that the Petitioner as proponent bears the burden to prove his case against the Respondents and to do so beyond a simple balance of probabilities.

5. ANALYSIS AND FINDINGS

5.1 Following the conclusion of trial, the Petitioner tendered final submissions on 29th September 2021 to which the First and Second Respondents reacted with opposing submissions on 4th October 2021 and 30th September 2021, respectively.

5.2 I propose to dispense with a copious reproduction of the submissions for reasons which shall become apparent.

5.3 That said, I have closely studied the material on record, evidence and competing submissions which were well researched and immensely useful. After a careful consideration, my decision is as set out below.

The contention of misconduct

Alleged developmental projects

5.4 This sub-contention is introduced in paragraph 7.(d) of the petition as follows -

“ The First Respondent undertook developmental projects during the campaign period: -

- i) The construction of IDECO Clinic in Ipusukilo Compound;*
- ii) The construction of a bridge at Bulangililo market; and*
- iii) The construction of an ablution block at Kwacha East Bulangililo market.”*

5.5 In his testimony before Court, the Petitioner complained that the aforesaid projects were undertaken by the First Respondent using CDF even after dissolution of the National Assembly and start of campaign period.

5.6 The source of the information that the projects were done by the First Respondent was said (by the Petitioner and PW2) to come from the Kitwe City Council upon inquiry by the Petitioner acting through PW2.

5.7 The Town Clerk of the Council appeared before Court and testified as RW5. He gave a lucid account of how CDF is utilised for projects in a constituency truncated as:

- (i) the CDF committee plays the role of initiator;
 - (ii) the Ministry of Local Government is the approving authority;
- and
- (iii) the Council plays the dual role of custodian of CDF and implementer of the approved project.

5.8 He also testified in chief and lucidly maintained in cross examination that all three projects complained of in this petition were undertaken using CDF including during campaigns and that there was no interplay between the CDF legal regime and electoral law which required projects to be halted during campaign period.

5.9 RW5 did concede during cross examination that because of the leeway given to an area MP to nominate some of the members of the CDF committee an MP wields significant influence over the committee.

5.10 In the absence of evidence beyond just what PW2 says he was told, I am inclined to accept RW5's testimony as I hereby do and find that the projects were implemented using CDF which continued through campaign period.

5.11 As for the issue of whether that amounted to misconduct, I have had recourse to the **Constituency Development Fund Act**¹⁰ (the "**CDF Act**") which in section 15(3) gives the line Minister power to approve a project and in section 21(1) casts the implementation role on councils.

- 5.12 There is no provision in the **CDF Act** that proscribes approval and or implementation of a project that will run during the campaign period.
- 5.13 Further, I have reviewed the **EPA** and found no interplay between it and the **CDF Act** that restricts the implementation of CDF projects during campaign period.
- 5.14 The end result is that whilst it is undesirable that an MP seeking re-election can influence a CDF committee to initiate projects that will be implemented in future during campaign period (thereby getting an upper hand over other contestants), it is not illegal or proscribed as misconduct under the current state of our election laws.

Alleged violence and intimidation

- 5.15 This sub-contention is introduced in paragraph 7. (e),(f),(h),(j),(k),(m) and (n) of the petition as follows -

“

- e) *The Petitioner was not allowed to campaign by the Zambia Police while the First Respondent was at large campaigning;*
- f) *The levels of violence during the campaign period perpetrated by the First Respondent and his agents against the Petitioner and his supporters were so high*

that they prevented the Petitioner from canvassing for votes in a number of areas within the constituency;

g) ---;

h) On the 31st May 2021 at about 10:30 hours three (3) members of the Petitioner's campaign team namely; Beatrice Bwalya (female), Justin Mulenga (male) and Mailess Chibwe (female) were brutally assaulted and stripped naked by the First Respondent's agents near VML Filling station within Kwacha Constituency;

i) ---;

j) On 24th July, 2021 a Mr. Chella a staunch PF member and ward chairman for Ipusukilo resigned together with 30 members from PF and joined UPND at a public gathering held at the UPND Secretariat in Riverside. A few days later, the First Respondent sent his agents and other PF thugs to attack him at his home forcing him to go into hiding together with his family;

k) On the 27th July, 2021 at around 12:20 hours, during a door-to-door campaign trail in Musonda ward the First Respondent unleashed a horde of approximately 200 heavily armed police officers;

l) ---;

m) On 12th August 2021, the Petitioner's campaign manager Mrs. Bertha Chanda together with Pastor Kabijimpanga were attacked in Riverside at around 12:00 hours by a group of PF thugs who were sent by the First Respondent; and

n) The First Respondent's agents and other PF cadres removed all the Petitioner's and UPND campaign posters, banners and other materials around Kwacha Constituency which reduced his visibility to the electorate and the Petitioner's chances of being elected as the Member of Parliament."

- 5.16 I will begin with the allegations in paragraph 7. (e) and (k) which fault the Zambia Police for hindering the Petitioner's campaign.
- 5.17 The Petitioner gave a vivid account of the Police frequently summoning him to the station to answer to allegations of criminal infractions on his part without basis.
- 5.18 He also narrated without any inconsistency of how his door to door campaign of 27th July 2021 in Musonda ward was disrupted by the Police.
- 5.19 This testimony was backed by that of PW12 and PW13 who were eye witnesses and the latter of who was even chased by the Police but evaded being apprehended. The evidence of the two on the point was not shaken in cross examination.
- 5.20 The First Respondent from his part denied (on the stand) that the Police acts complained of were under his instruction. That said, the First Respondent did emphatically state that he was in the recent past the Foreign Affairs Minister and fifth in the governance hierarchy. He also testified about having empowered the Police with *inter alia* infrastructure.
- 5.21 It is thus possible that if instructed by the First Respondent at the time, the Police could have acted accordingly, particularly with

the unchallenged evidence of the Petitioner that the Police in Kitwe were biased against UPND when in opposition.

5.22 However, I must remind myself that the standard of proof is beyond a simple balance of probabilities. Consequently, in the absence of a record of instructions from the First Respondent or a witness who perceived him issuing same, I am unable to find that the proven hindrance of the Petitioner's campaign by the Police was at the instance of the First Respondent.

5.23 I now turn to the VML incident of 31st May 2021 in paragraph 7.(h) of the petition. PW3 and PW4 gave a chilling but vivid account of how they were brutally attacked and assaulted whilst on a campaign branding exercise in Riverside ward. Their evidence was backed by medical reports of the injuries sustained and video footage (see exhibits "CAM13", "CAM15" and "CAM16" in the Petitioner's affidavit in reply).

5.24 PW3 testified in cross examination that the assailants were PF cadres because they said they had been sent by their boss and in re-examination added that they wore PF regalia. PW4 for her part testified that the assailants wore PF regalia and referred to the First Respondent by name as their boss.

5.25 While I accept and find that the savage attack and assault at VML did take place at the hands of PF cadres, I am unable to find that it was at the instance of the First Respondent (directly or that of his agents) as:

- (i) in the video footage¹¹, the assailants hurl insults at PW3 for removing banners of '*Ba Lungu Ba Kateka*' as they say, not the First Respondent;
- (ii) PW3 and PW4 both testified that they did not know the identities of the assailants, which in my view could (if known) have been interrogated to establish a link (if any) to the First Respondent; and
- (iii) PW4 appears to have exaggerated her testimony as she stated that the assailants were about 30 in number but the video footage shows that they were only a handful.

5.26 Turning now to the incident of 24th July 2021 particularised in 7.(j) of the petition, PW10 testified that he defected from PF to UPND and was thereafter subjected to verbal abuse by the PF Kwacha constituency chairman and also the women's secretary as well as by a security team created by the First Respondent.

¹¹ Exhibit 'CAM13' in the Petitioner's affidavit in reply

- 5.27 PW10 testified that even the Police were looking for him and he went into hiding.
- 5.28 As for the incident of violence, PW10 testified that whilst he was away from home the said security team attacked his home in the night and broke doors and windows. He said his wife is the one who saw them.
- 5.29 PW10 also said that whilst in hiding he was tipped off that the First Respondent was looking for him and promised a ransom for anyone who would find him.
- 5.30 However, the Petitioner did not call PW10's wife to testify about what she is said to have witnessed (of the attack) nor was the person who tipped PW10 called to explain the source of their information that PW10 was wanted by the First Respondent.
- 5.31 There was also no evidence led to prove that the Police were looking for PW10 at the instance of the First Respondent.
- 5.32 Again I must remind myself that the standard of proof in election petitions is beyond a simple balance of probabilities.
- 5.33 Consequently, without supporting eye-witness testimony (to confirm that what was told to PW10 actually occurred), I am unable to safely find that the attack on his residence and terror

suffered by him (to the detriment of the Petitioner's campaign) was at the instance of the First Respondent.

5.34 I now address the incident alleged in paragraph 7.(m) of the petition that the Petitioner's campaign manager Bertha Chanda and Pastor Kabijimpanga were attacked on 12th August 2021.

5.35 The Petitioner did not call any of the two to testify about it nor did he state that he witnessed the incident. It would thus be speculative for me to make any finding that the incident had anything to do with the First Respondent or that it even occurred at all.

5.36 I move on to the allegation in paragraph 7.(n) of the petition that the First Respondent's agents and other PF cadres removed all the Petitioner's campaign materials around the constituency.

5.37 The Petitioner did testify in chief (and was not thereafter shaken on the point) that whenever he would send his campaign team to put up UPND materials in the constituency, they would be removed the next day by agents of the First Respondent.

5.38 However, save for Riverside ward, the Petitioner did not bring witnesses to testify and prove that the removal of the said materials in the various wards was attributable to the First Respondent or his electoral or polling agents.

5.39 As for Riverside ward, the unchallenged testimony of PW3 and PW4 on the point fortified the position that PF cadres removed and caused to be removed the UPND campaign materials that they put up.

5.40 However, I did find the evidence inconclusive on whether the First Respondent was culpable for the acts of the said cadres (in Riverside ward) who spoke of the PF presidential candidate not the First Respondent.

5.41 I am fortified in this regard by the decision of the Constitutional Court in *Richwell Siamunene v Sialubalo Gift*¹² wherein it was pronounced:

"We note that there is insufficient evidence to support a finding that the documented acts of violence that occurred after the nomination day are linked to the respondent. Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election."
(Emphasis added)

¹² Vol. 3 (2017) ZR 335 at 354

5.42 By virtue of the doctrine of *stare decisis*, the said and all other decisions of the Constitutional Court are binding on this Court which is hierarchically inferior.¹³

5.43 Accordingly, whilst the acts without a doubt hindered the Petitioner's visibility to the electorate thereby unfairly disadvantaging him against his fellow contestants (including the First Respondent), I am unable to safely ascribe the blame to the First Respondent as distinct from PF members in general in Kitwe district.

Alleged bribery and vote buying

5.44 This sub-contention is introduced in paragraph 7. (g), (i) and (l) of the petition as follows –

“

g) *On Sunday July 6th 2021, the First Respondent was seen dishing out money between 15:00 hours and 17:30 hours to traders at Ipusukilo market.*

h) ---;

i) *On Sunday July 18, 2021 at around 15:00 hours the First Respondent was seen dishing out cash to traders at Kapoto market in a bid to induce voters to vote for him;*

j) ---;

k) ---;

¹³ Article 121 of the Constitution stipulates that the Constitutional Court ranks equivalent to the Supreme Court and *Match Corporation Limited v Development Bank of Zambia & Anr* (1999) ZR 18 at p.23 lines 23 to 30 is authority for applicability of the doctrine of *stare decisis* in Zambia.

- l) *On 11th August, 2021 the First Respondent engaged in acts of vote buying and inducement of voters through the distribution of money and mealie-meal to residents and voters in Ipusukilo, Musonda and Lubwa Wards;*"

5.45 There was no evidence adduced by the Petitioner or his witnesses to prove the allegation that the First Respondent was dishing out money to traders at Kapoto market on 18th July 2021 at 15:00 hours.

5.46 Similarly, there is no evidence to back the allegation of distribution of mealie meal to residents and voters by the First Respondent on 11th August 2021 at Ipusukilo, Musonda and Lubwa wards.

5.47 I therefore find the two allegations to be unsubstantiated and without basis.

5.48 As for the allegation that on 6th July 2021, the First Defendant was distributing money at Ipusukilo market, the Petitioner's testimony was that he saw the First Respondent from a distance in the midst of a crowd and stretching out his arms towards people he was greeting. This testimony was not shaken in cross examination.

5.49 PW2 testified in chief that he saw the First Respondent on 6th July 2021 distributing money at Ipusukilo market which was counted

as K15,000. PW2 also testified that the First Respondent proceeded to Kapoto market where he also distributed money. PW2 maintained his testimony in cross examination and added when asked that the money was in K50 notes.

5.50 The First Respondent's side of the story was that he did indeed give K15,000 at a market but that it was to a group of marketeers at Kapoto market on 18th July 2021 for purchase of 150 chickens for his foot soldiers and collected the next day.

5.51 RW2 testified that she was the recipient of the K15,000 for chickens but that it took place at Ipusukilo market in August 2021 and the money was given to her alone not multiple marketeers.

5.52 RW8 testified about being present when the First Respondent paid K15,000 for chickens at Kapoto market. He however contradicted the First Respondent by testifying that the incident was on 2nd August 2021 and the First Respondent dealt with only one marketer and left with the chickens after payment.

5.53 Given the inconsistencies in the First Respondent's evidence on:

- (i) date of the incident;
- (ii) venue; and
- (iii) number of recipients of the money;

I am inclined to accept the Petitioner's version that on 6th July 2021, the First Respondent was distributing money to marketeers at Ipusukilo market to induce them to vote for him, contrary to section 81(1)(a) of the **EPA**.

5.54 Turning now to the incident of distribution of money on 11th August 2021 to residents of Ipusukilo, Musonda and Lubwa wards. The evidence is as follows.

5.55 PW6 and PW7 testified with convincing credibility that they received K100 each from the First Respondent at Zambia compound on 11th August 2021. PW6 did however admit during cross examination that the money was paid out at a closed event for PF cadres only.

5.56 I see no fault in that as it is expected that political candidates may assist their cadres with resources for various purposes which include logistics.

5.57 PW5 and PW8 for their part testified that they each received K100 from the First Respondent at Kwacha market on 11th August 2021, coupled with his plea for their vote. I am inclined to believe their evidence as:

- (i) it was not shaken in cross examination; and

(ii) when questioned about it in examination in chief, the First Respondent looked away from the Court in an unconvincing demeanour before answering that he never went to any market on 11th August 2021 and that it would have been chaotic to distribute money the day before voting.

5.58 I accordingly find that the First Respondent did distribute money at Kwacha market on 11th August 2021, which was misconduct in terms of section 81(1)(a) of the **EPA**.

5.59 There was evidence from PW14 of an unpleaded matter of 4th August 2021 where she alleged that she was in a shop outside Chikwepe market in Chipata compound, Musonda ward when she saw a moving crowd of people and the First Respondent eventually approached and gave her K100 coupled with a plea for her vote.

5.60 The evidence was let in without objection by Counsel for the respective Respondents and accordingly, I am not precluded from considering it on the authority of *Undi Phiri v BOZ*.¹⁴

5.61 The first hand account by PW14 was not shaken in cross examination. I accordingly find it to be another proven instance of misconduct by the First Respondent, contrary to section 81(1)(a) of the **EPA**.

¹⁴ (2007) ZR 186 at 195

5.62 Also let in on an unpleaded matter was the evidence of PW15:

- (i) that sometime in July 2021 he received K40 from the First Respondent at a public meeting at Bulangililo Secondary School; and
- (ii) that on another day in July 2021 he heard that the First Respondent was distributing money at Bulangililo market but his trip there yielded no results as PF cadres advised him that the beneficiaries were only market traders.

5.63 I have discounted this evidence as firstly, RW3, who was the head teacher at Bulangililo School testified with credibility that no political meeting took place there during the period. I also found the First Respondent's explanation to be reasonable that he stayed clear of Bulangililo school as it was a designated polling station.

5.64 Secondly, by his testimony PW15 did not actually see the First Respondent distribute any money at Bulangililo market. I am thus not persuaded by the mere insinuation of misconduct in the absence of cogent evidence of it.

5.65 There was also the unpleaded matter of the incident alleged by PW8 that on election day, there was a cooking camp set up by the PF about 90 metres away from Mukuba polling station. It was his

evidence in chief that he heard that the camp was urging people to vote for PF and was also distributing money.

5.66 I have discounted the evidence of PW8 as firstly he did not testify that he personally heard the people in the camp lobbying for votes and offering money.

5.67 Secondly, PW8 admitted in cross examination that he (as a monitor at the polling station) had a duty to the presiding officer over the conduct of the election but he did not report the alleged incident of a cooking camp, which I find strange.

Effect of the misconduct

5.68 Having found that there was some misconduct by or attributable to the First Respondent in respect of the election, I now move on to address the effect as the determinant of whether the misconduct qualifies for purposes of nullification.

5.69 By way of recap, I did above find the First Respondent culpable of misconduct of distributing money to lobby for votes in the following three instances –

- (i) at Ipusukilo market (Ipusukilo ward) on 6th July 2021;
- (ii) at Chipata compound (Musonda ward) on 4th August 2021;
- and
- (iii) at Kwacha market (Kwacha ward) on 11th August 2021.

5.70 The ECZ statistics exhibited in the agreed bundle of documents filed 23rd September 2021 (at p.2-5) show that Kwacha constituency has a total of 64,145 registered voters.

5.71 What this means therefore is that for the misconduct established to qualify as grounds for nullification it must be shown that the majority of voters i.e 32,073 (or more) were or may have been prevented from electing their preferred candidate.

5.72 The relevant wards where the misconduct was proven have the following number of registered voters (according to the agreed bundle) -

- | | | |
|-------|-----------|------------|
| (i) | Ipusukilo | 10,945; |
| (ii) | Musonda | 7,629; and |
| (iii) | Kwacha | 11,286. |

5.73 The combined total number of registered voters for the said three wards is 29,860.

5.74 Therefore, even assuming that the three incidents induced all the registered voters in the 3 wards and there was a 100% voter turnout on the day with all of them voting for the First Respondent (which is not reasonably possible), the total of 29,860 falls short of a simple majority of the registered voters in the constituency, being 32,073.

5.75 I accordingly find that the 3 isolated incidents of misconduct by the First Respondent in only 3 out of the 7 wards was not so extensively prevalent to be said that it did or may have swayed the majority of voters in entire constituency from electing their preferred candidate.

The contention of procedural irregularity

5.76 The first of the Petitioner's three pronged approach to this contention is contained in paragraph 7(a) of the petition reproduced as:

"Some of the GEN 20a forms obtained from the Electoral Commission of Zambia (ECZ) by the Petitioner with total votes of 1,183 were not entered on Form ECZ 19 at the Totalling Centre hence the announced total figures by the Returning Officer were not a true reflection of the outcome of the elections;"

5.77 In addressing this sub-imb, it is important to get an understanding of what a Gen 20 form is. It is created by the **Electoral Process (General) Regulations**¹⁵ as a record generated by a presiding officer at a polling station indicating therein:

- (i) the total number of votes cast;

¹⁵ S. I. No. 63 of 2016 in regulation 49(2)

- (ii) the total number of votes rejected; and
- (iii) the breakdown of the valid votes cast in terms of each candidate.

5.78 The Gen 20 form is also used by the presiding officer to announce the results at a polling station.¹⁶

5.79 Further, according to the unchallenged testimony (on the point) of RW10 who was the returning officer for Kwacha constituency, Gen 20 forms from all the polling stations are used at the totalling centre as source documents for consolidated totals for each candidate.

5.80 In the case before Court, the Petitioner did not in his originating process particularise which Gen 20 forms from which polling stations were not entered in ECZ form 19 at the totalling centre.

5.81 He also did not otherwise draw the attention of this Court (during his testimony) to which of the Gen 20 forms exhibited in his affidavit verifying facts were the ones allegedly not factored in at the totalling centre in ECZ form 19.

5.82 Further, the Petitioner did infact exhibit form ECZ 19 as 'CAM2' in his affidavit verifying facts and when cross examined by Counsel for the Second Respondent he admitted:

¹⁶ Ibid., in regulation 49(2)

- (i) that it correctly indicated that the constituency had 91 polling stations in total as pleaded in paragraph 3 of his petition; and
- (ii) that it showed that the results from all of them had been recorded.

5.83 I accordingly find that the Petitioner's allegation (that some Gen 20a forms were not accounted for in ECZ form 19) is unsubstantiated and baseless.

5.84 In any event, the Petitioner did admit when cross examined by Mr Imonda (for the Second Respondent) that even assuming that the 1183 votes that he alleged were not accounted for were added to his total, it would still not have resulted in him being victorious.

5.85 I accept that honest admission by the Petitioner because in terms of arithmetic, the evidence shows that he polled 17,065 votes versus the 25,979 of the First Respondent, giving a difference of 8,914 that could not be bridged by the 1183 votes in issue.

5.86 The second sub-limb of this contention appears in paragraph 7(b) of the petition as:

"The total figure on one other GEN 20a form obtained from ECZ by the Petitioner had a different figure as recorded on Form ECZ 19 at the Totalling Centre hence not a true record of the election results;"

- 5.87 In his testimony in chief, the Petitioner singled out the first of the Gen 20a forms exhibited as 'CAM1' in his affidavit verifying facts and flagged the discrepancy between the sum of the breakdown figure for all candidates (303) and the total endorsed (312).
- 5.88 Looking at the data on the said document, it indeed shows that the sum total of votes validly cast for all candidates is 303 as stated by the Petitioner.
- 5.89 However when one factors the 8 rejected ballots, the global total of all votes cast (valid and invalid) should have been 311 not the 312 endorsed.
- 5.90 In that regard, the Petitioner is correct that the total on the form is incorrect. However, the computation error of 1 vote is insignificant in terms of closing the gap of 8,914 votes between the Petitioner and First Respondent.
- 5.91 I now turn to consider the final sub-limb of this contention which is framed in paragraph 7(c) of the petition as:

"Some GEN 20a forms obtained from ECZ by the Petitioner had no name of the Presiding Officer, polling station and Constituency and could therefore not have had figures of ballots from a polling station in Kwacha Constituency;"

5.92 RW10 who was the returning officer for Kwacha constituency testified when cross examined by Mr Kasaji (for the Petitioner) that if a Gen 20a form lacked the requisite particulars such as name of presiding officer, polling station and constituency it would be invalid.

5.93 I have combed through the documents on record and found four Gen 20a forms¹⁷ where the names of the presiding officer, polling station and / or constituency are missing and the figures of the ballots therein are as follows:

- (i) 312 cast in total and 8 spoilt;
- (ii) 700 cast in total and 6 spoilt;
- (iii) 617 cast in total and 4 spoilt; and
- (iv) 475 cast in total and 13 spoilt.

5.94 The combined sum of votes cast from the four is 2104 while that of the spoilt ballots is 31. The difference of 2073 between the two, even if all were to be apportioned to the Petitioner, would not bridge the gap of 8,914 votes between the Petitioner and First Respondent.

¹⁷ See exhibit "CAM1" in the affidavit verifying petition, documents 1, 3, 5 and 6 in the cluster

5.95 As for the unpleaded (but proven) sub-limb of the procedural contention that a number of the Gen 20a forms were not signed by the Petitioner's agents, the **Electoral Process (General) Regulations**¹⁸ in regulation 49 (2) provides:

"The presiding officer shall announce how the votes have been cast for each candidate in Form GEN 20 set out in the Schedule, and how many have been rejected in the polling station and may require if present, election agents or monitors to countersign the results, except that failure to countersign the election results does not render the results invalid."
(Emphasis added)

5.96 It follows that the absence of the Petitioner's agents' signatures on the relevant Gen 20a forms does not affect their validity and does not thereby warrant any further consideration.

5.97 Perhaps more significantly is the Petitioner's admission during cross examination by Mr Imonda (for the Second Respondent) that-

- (i) he would get comfort from a document that was signed by a UPND agent;

¹⁸ S. I. No. 63 of 2016

- (ii) he had produced ECZ form 21 (as "CAM3" in his affidavit verifying facts), which was a declaration of the results for each candidate in the Kwacha constituency election; and
- (iii) the said ECZ form 21 was signed by a UPND agent.

5.98 Going by the Petitioner's said admission it is strange for him to now change position and question the regularity of the process whose computation of results was accepted (by the Petitioner) through the endorsement of ECZ form 21 by his agent.

5.99 Therefore, in summary under this contention, I find that whereas there were some incidents of irregularity in the electoral process, the conduct of the election cannot be said to have substantially deviated from the EPA and the small number of votes in issue did not affect the result in terms of victory by one candidate over the other[s].

The contention of eligibility

5.100 The **Constitution** in article 70(1)(d) prescribes:

"(1) Subject to clause (2), a person is eligible to be elected as a Member of Parliament, if that person
(f) ---;

(g)---;

(h)---;

(i) **has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent;** and

(j) ---." (Emphasis added)

5.101 The aforesaid criterion was brought into contention by the Petitioner in paragraph 13 of his petition reproduced as:

"Further, the Petitioner will aver at trial that the First Respondent does not possess a grade twelve (12) certificate as demanded by the Constitution."

5.102 The First Respondent's reaction to the allegation was pleaded as follows in paragraph 2.7 on the last page of his answer:

"The contents of paragraph 13 is denied as the ECZ accepted the First Respondent's nominations and it is only ECZ who can reject a candidate on account of Grade 12 certificate. It therefore follows that the Petitioner has nothing to deal with things that concerns."

5.103 It is clear from the foregoing that the First Respondent in his pleading did not rebut the Petitioner's allegation of fact but instead mounted a legal technical challenge that the contention

was not an issue at law, since he (the First Respondent) had successfully filed his nomination with the Second Respondent.

5.104 As stated earlier, the Second Respondent for its part did not tender any pleadings in this matter.

5.105 I will address the legal technicality first as its outcome will determine whether or not to proceed to consider the evidential merits of the contention.

5.106 The position of the First Respondent as pleaded and supported by his testimony and that of the Second Respondent's sole witness (Mr Felix Mwila) is that the First Respondent successfully filed his nomination with the Second Respondent.

5.107 Mr Mwila also testified that there is a 7 day window for challenge of any nomination, which period expired without any challenge to the First Respondent's nomination.

5.108 In trying to persuade me that the Grade 12 certificate contention was overtaken by the unchallenged nomination, the First Respondent has argued that the issue is an afterthought which is in any event statute barred after the lapse of 7 days from close of nominations. The First Respondent has relied on article 52(4) of the **Constitution** which I quote:

"A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty one days of its lodgement." (Emphasis added)

5.109 It is tempting to accept that argument, however on close scrutiny of article 52(4) the wording is expressly confined to a challenge of a nomination. The case before Court is a challenge of the election not the nomination.

5.110 Furthermore, article 73(1) of the **Constitution** which is the root of the right to petition a parliamentary election does not stipulate the grounds, which are instead prescribed in section 97(2) of the **EPA** as discussed in the legislative review earlier in this judgment.

5.111 Section 97(2)(c) in particular is couched:

"97. (1) ---.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a)---;

(b) ---;

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election" (Emphasis added)

5.112 Quite clearly, the relevant point in time for purposes of a challenge anchored on s.97(2)(c) is the time of election, which in this case is 12th August 2021.

5.113 In other words, s.97(2)(c) does not look at a candidate in terms of the past (pre-election date) or the future (post-election date) but instead the present (on election day).

5.114 The election having been on a date after that of filing of the nominations means it is irrelevant whether a contestant was successful at nomination stage as their subsequent election can still be challenged if at the point of election they were not qualified in terms of article 70(1) or disqualified under article 70(2) of the **Constitution**.

5.115 I therefore reject the First Respondent's proposition that [by virtue of his successful nomination as a candidate] the eligibility issue is a non-issue or that it is otherwise statute barred.

5.116 Having dealt with the legal technicality, I now proceed to address the merits of the contention based on the evidence.

- 5.117 In the case before Court the Petitioner has asserted the negative on the issue in his pleadings, that is to say that the First Respondent did not possess a Grade 12 certificate at the time of election.
- 5.118 The First Respondent when cross examined (by the Petitioner's Counsel) asserted in the affirmative that he did possess a Grade 12 certificate but admitted that he had not produced it before Court.
- 5.119 The First Respondent explained that he did not produce the Grade 12 certificate because (prior to taking the stand) he did not know that it was required before Court.
- 5.120 I am not persuaded by the First Respondent's explanation as the contention was known to him from inception of this case having been expressly pleaded by the Petitioner and embodied as one of the grounds for the petition.
- 5.121 Evidently, the First Respondent has failed to adduce cogent evidence to support his assertion of the affirmative on this contention i.e that he **did** possess a Grade 12 certificate on 12th August 2021.
- 5.122 His predicament is worsened by the doubt created by:
- (i) the fact that -

- a) the First Respondent did not in his affidavit in support of answer produce it which would have been the logical and simplest response / rebuttal; and
 - b) the First Respondent did not even allege in his answer that he possessed a Grade 12 certificate nor did he address it in examination in chief but only said so for the first time when cross examined;
- (ii) the fact that the Second Respondent did not tender any pleadings alleging (*inter alia*) that a Grade 12 certificate was one of the documents presented by the First Respondent at nomination stage; and
- (iii) the fact that RW10 who was the returning officer (that presided over the nomination exercise) did not produce a copy of the First Respondent's Grade 12 certificate or even allege in his testimony that it was part of the nomination papers submitted by the First Respondent to him.

5.123 I accordingly accept that it has been proven by the Petitioner beyond a simple balance of probabilities that the First Respondent did not possess a Grade 12 certificate at the time that he was re-elected.

5.124 The Constitutional Court had occasion to interpret the relevant article being 70(1)(d) of the **Constitution** in the case of *Bizwayo*

*Newton Nkunika v Lawrence Nyirenda & ECZ*¹⁹ and I quote the pronouncement by Musaluke JC as follows –

- “9.2 The term ‘grade twelve (12) certificate’ used in Article 70(1)(d) of the Constitution is synonymous to the term ‘school certificate’ when read with section 6 of the Constitution of Zambia Act No.1 of 2016.
- 9.3 The word ‘equivalent’ to a grade twelve (12) certificate as envisaged in Article 70(1)(d) relates to qualifications that are comparable in value, amount, meaning and functions and are neither inferior nor superior to a school certificate. The qualifications may include academic qualifications that have been obtained in other jurisdictions but which are equivalent to a school certificate in Zambia.
- 9.4 A General Certificate of Education (GCE) is equivalent to a grade twelve (12) certificate as envisaged by Article 70(1)(d) of the Constitution if the number of subjects passed and the grades obtained satisfy the requirements for obtaining a school certificate.
- 9.5 a tertiary, vocational, craft, trade or apprenticeship certificate is not equivalent to a grade twelve certificate (school certificate) as it is not comparable in value, amount, meaning and function to a grade twelve (12) certificate.”
(Emphasis added)

5.125 It follows therefore that there was a mandatory requirement for the First Respondent to have held either a Grade 12 certificate

¹⁹ Judgment dated 10th March 2021 in 2019/CCZ/005 at page J75-J76

or its equivalent at the time of his re-election as MP for Kwacha constituency.

5.126 I have already found it proven that the First Respondent did not possess a Grade 12 certificate as at 12th August 2021. There is equally no evidence of him otherwise holding a GCE certificate or other equivalent of a Grade 12 certificate.

5.127 I accordingly find that the First Respondent did not meet the eligibility requirement under article 70(1)(d) of the **Constitution** at the time of his re-election as MP for Kwacha constituency.

6. CONCLUSION AND ORDERS

6.1 The Petitioner challenged the re-election of the First Respondent as MP for Kwacha constituency on all three possible grounds namely:

- (i) misconduct;
- (ii) procedural irregularity; and
- (iii) eligibility.

6.2 Though some instance of misconduct has been proven against the First Respondent, it was not so extensively prevalent to conclude that it did or may have prevented the majority of the 64,145

registered voters in the constituency from electing their preferred candidate.

6.3 Further, the election was conducted by the Second Respondent substantially in accordance with the electoral laws and the few procedural irregularities proven were not significant enough to have affected the result in terms of the success of one candidate over the other.

6.4 It follows therefore that the first two grounds of the petition lack merit and are hereby dismissed.

6.5 As for the third ground, it has been proven to the satisfaction of this Court that at the time of his re-election, the First Respondent was not eligible for election on account of his not meeting the minimum academic qualification set by article 70(1)(d) of the **Constitution**.

6.6 The petition therefore succeeds on that ground as against the First Respondent but fails in its entirety as against the Second Respondent.

6.7 I accordingly invoke section 99(a) of the **EPA** and declare the First Respondent's re-election, on 12th August 2021 as MP for Kwacha constituency, to be void.

6.8 As for costs, section 109 of the **EPA** confers discretion on this Court and the case of ***Afropo Zambia Limited v Anthony Chate & Ors***²⁰ serves as a useful guide for the exercise of that power. I quote Wood, JS who aptly stated on behalf of the Supreme Court guided that -

“It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs.” (Emphasis added)

6.9 In the case before Court, the Petitioner has succeeded against the First Respondent and the nature of the claim does not warrant any deprivation of costs nor does the conduct of the Petitioner during the case.

6.10 As for the Second Respondent, it has successfully defended the case by the Petitioner and I see no bar to a costs award based on either the nature of the claim or the Second Respondent’s conduct throughout the Court proceedings.

²⁰ Appeal No. 160/2013 at p. J16

6.11 I thus order that the Petitioner will have his costs against the First Respondent while the Second Respondent will have its costs against the Petitioner, to be taxed in default of agreement.

Dated this 19th day of November 2021.



K. CHENDA
Judge of the High Court